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REPORT

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ALABAMA

DURING THE

NOVEMBER TERM, 1908-1909

BY
LAWRENCE H. LEE

Supreme Court Reporter

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VOL. 159

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DURING THE TIME OF THESE DECISIONS.

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†JAMES R. DOWDELL, CHIEF JUSTICE, LaFayette.

R. T. SIMPSON, ASSOCIATE JUSTICE, Florence.

JOHN C. ANDERSON, ASSOCIATE JUSTICE, Demopolis.

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ROBERT H. GREENE, SECRETARY, Montgomery.

*Resigned Feb. 5th, 1909.

†Appointed to succeed Tyson, C. J.

‡Appointed to fill vacancy caused by promotion of Dowdell, C. J.

**JUDGES OF CIRCUIT COURTS DURING THE TIME THE CASES
REPORTED IN THIS VOLUME WERE TRIED.**

1st Circuit.....	HON. JOHN T. LACKLAND..	Grove Hill.
2d Circuit.....	HON. J. C. RICHARDSON.....	Greenville.
3d Circuit.....	HON. A. A. EVANS.....	Clayton.
4th Circuit.....	HON. B. M. MILLER.....	Camden.
5th Circuit.....	HON. S. L. BREWER.....	Tuskegee.
6th Circuit.....	HON. SAMUEL H. SPROTT.....	Livingston.
7th Circuit.....	HON. JOHN PELHAM.....	Anniston.
8th Circuit.....	HON. D. W. SPEAKE.....	Decatur.
9th Circuit.....	HON. W. W. HARALSON.....	Fort Payne.
10th Circuit.....	{ HON. A. A. COLEMAN.....	Birmingham.
	{ HON. A. O. LANE.....	Birmingham.
11th Circuit.....	HON. C. B. ALMON.....	Sheffield.
12th Circuit.....	HON. H. A. PEARCE.....	Dothan.
13th Circuit.....	HON. SAMUEL B. BROWNE.....	Mobile.
14th Circuit.....	HON. J. J. RAY.....	Jasper.
15th Circuit.....	HON. W. W. PEARSON.....	Montgomery.
16th Circuit.....	HON. JOHN W. INZER.....	Ashville.

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IN THIS VOLUME WERE HEARD.**

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Northwestern Chancery Division..	HON. ALFRED H. BENNERS,	B'ham.
Southeastern Chancery Division..	HON. L. D. GARDNER,	Troy.
Southwestern Chancery Division..	HON. THOMAS H. SMITH,	Mobile.

SUPERNUMERARY JUDGE.

HON. A. H. ALSTON.....	Clayton.
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**JUDGES OF INFERIOR COURTS OF LAW AND EQUITY
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Bessemer City Court....	HON. WM. JACKSON.....	Bessemer.
Birmingham City Court {	HON. CHAS. A. SENN.....	Birmingham.
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	HON. C. C. NESMITH.....	Birmingham.
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	{ HON. S. L. WEAVER.....	Birmingham.
Clarke County Court....	HON. THOS. W. DAVIS.....	Grove Hill.
Gadsden City Court....	{ HON. JOHN H. DISQUE.....	Gadsden.
	{ HON. ALTO V. LEE.....	Gadsden.
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Clay County Court.....	HON. W. H. PEARCE.....	Ashland.
Coffee County Court....	HON. H. H. BLACKMAN.....	Enterprise.
Mobile City Court.....	HON. O. J. SEMMES.....	Mobile.
Montgomery City Court {	HON. A. D. SAYRE.....	Montgomery.
	HON. WILLIAM H. THOMAS.....	Montgomery.
Mobile Law and Equity Court	HON. SAFFOLD BERNY.....	Mobile.
Morgan County Law and Equity Court ...	HON. THOMAS W. WERT.....	Decatur.
Madison County Law and Equity Court ...	HON. TANCRED BETTS.....	Huntsville.
Lee County Law and Equity Court ...	HON. ALBERT E. BARNETT.....	Opelika.
Walker County Law and Equity Court....	HON. T. L. SOWELL.....	Jasper.
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CASES

IN THE

SUPREME COURT OF ALABAMA

NOVEMBER TERM 1908-1909

Frazer v. The State.

Violating Written Contract.

(Decided April 9, 1909. 49 South, 245.)

1. *Fraud; Violating Contract; Evidence.*—Where the prosecutor had testified that he went to a certain point in Pike County distant from his home, and secured defendant and brought him back to his home because he was a surety on defendant's bond for his appearance to answer a criminal charge, and that this was done a short time before defendant entered into the contract alleged to have been violated, it was competent for the defendant to show that the grand jury had met, considered the charge for which he was bound to appear and had found no bill against him, since such evidence tended to shed light on the intent of the defendant in entering into the contract, and for the further purpose of impeaching the testimony of the prosecutor by showing that he did not bring defendant back for the purpose stated, he not being at that time liable as a surety.

2. *Same.*—The contract alleged to have been violated was properly admitted in evidence since it was in compliance with the statutory requirements.

3. *Same; Writing.*—The word, writing, as used in section 345, Code 1907, includes printing as well.

4. *Trial; Conduct of Court; Reading Statute to Jury.*—The court may properly read to the jury the sections of the Code bearing upon the crime for which one is then being prosecuted.

APPEAL from Pike Law Court.

Heard before Hon. A. H. OWENS.

From a conviction of entering into a written contract of hire with a fraudulent intent, Mack Frazer appeals. Reversed and remanded.

No counsel marked for appellant.

[Frazer v. The State.]

ALEXANDER M. GARBER, Attorney-General, for the State. The contract was properly admitted in evidence.—Greenl. on Evi. sec. 563. The court did not err in reading the statute to the jury.—*Holly v. The State*, 75 Ala. 14. The question was indefinite and the answer called for by it was irrelevant and immaterial.

DOWDELL, C. J.—The appellant was tried and convicted in the Pike county law court on an affidavit sworn out by Ben Parks, the prosecutor, charging him with a violation of section 6845 of the Criminal Code of 1907. Parks, the prosecutor, was examined as a witness on behalf of the state. He testified on his cross-examination “that about the 16th day of September, 1907, he went to Pronto, in Pike county, after the defendant, and carried him back to his (witness) place; that the reason he did this was that he was on defendant’s bond for his appearance at the circuit court in Pike county on a charge of assault with intent to murder; that he went on defendant’s bond about February 1, 1907.” Defendant’s counsel then sought to show by the witness, and also by the records of the circuit court, that at the spring term of 1907 of said circuit court the grand jury of said county had acted on the charge against the defendant of assault with intent to murder, and failed to indict the defendant, and returned “no bill” as to said charge. The trial court, on the objection of the solicitor, refused to allow this evidence, to which action of the court the defendant duly excepted.

In this ruling the trial court committed reversible error. The contract under which the defendant was prosecuted was executed on the 24th day of September, 1907. This was shortly after the prosecutor went to Pronto, and got the defendant, and carried him back to his (prosecutor’s) place, by reason, as he claims, of

[*Frazer v. The State.*]

being surety on the defendant's appearance bond. The gist of the present prosecution is the defendant's entering into the contract of hire with fraudulent intent and purpose, and thereby obtaining money which, with like fraudulent intent, he failed and refused to return, after refusal to carry out said contract. If the defendant entered into said contract under any sort of compulsion on the part of the prosecutor, then this would be a circumstance to go to the jury, and be considered by them in determining whether the defendant entered into the contract with fraudulent intent. On this theory the evidence offered was competent to go to the jury. Moreover, it was competent to contradict the testimony of the prosecutor as to his reasons for going to Pronto after the defendant, since he, as surety on defendant's appearance bond to answer for the charge of assault with intent to murder, was no longer bound as such surety after the grand jury had acted on the case and returned no bill.

There was no error committed in admitting in evidence the written contract entered into by defendant. Nor was there any error in the court's reading to the jury the section of the Criminal Code under which the defendant was prosecuted, nor in explaining to the jury that the word "writing" in the code included printing.

For the error pointed out, the judgment of the court is reversed, and the cause remanded.

Reversed and remanded.

SIMPSON, DENSON, and MAYFIELD, JJ., concur.

[Bailey v. The State.]

Bailey v. The State.

False Pretense.

(Decided Feb. 11, 1909. 48 South. 791.)

False Pretense; Indictment; Description of Person to Whom Pretense was made; Corporation.—An indictment for obtaining money by false pretense alleging that the false pretense was made to the Louisville & Nashville Railroad Company, a corporation, sufficiently alleges the person to whom the false pretense was made, since section 1, Code 1907, provides that the word, person, shall include a corporation as well as natural person.

APPEAL from Montgomery City Court.

Heard before Hon. W. H. THOMAS.

Ed Bailey was convicted of obtaining money under false pretense from the Louisville & Nashville Railroad Company, a corporation, and he appeals. Affirmed.

JOHN W. SANFORD, JR., for appellant. No brief came to the Reporter.

ALEXANDER M. GARBER, Attorney-General, and THOMAS W. MARTIN, Assistant Attorney-General, for the State. The indictment was not subject to the demurrers interposed.—*White v. The State*, 86 Ala. 69; *State v. Houl-dah*, 78 Minn. 524; *State v. Turvey*, 142 Mo. 402; 19 Cyc. 425.

DOWDELL, J.—The appellant was tried and convicted on an indictment for obtaining money under false pretenses. The indictment is in Code form.—Cr. Code 1907, p. 670, form No. 58. There is no bill of exceptions in the record, and the only question presented for our consideration is the one raised by the demurrer to the indictment. The demurrer takes the point that the in-

[Bailey v. The State.]

dictment fails to allege the name of any person to whom any false representation was made, but instead thereof alleges that the false pretense was made to the Louisville & Nashville Railroad Company, a corporation.

So far as we are advised, this is the first time this precise question has ever been presented to this court. The case of *White v. State*, 86 Ala. 69, 5 South. 674, is somewhat analogous; appellant there having been convicted of attempting to defraud by false pretenses "the Louisville & Nashville Railroad Company, a corporation duly incorporated under the laws of Kentucky." The indictment in that case was not assailed on the point here raised. In 19 Cyc. p. 425 (D), it is said: "An indictment for obtaining property by false pretense must allege specifically that defendant made the pretense in question, and state to whom the pretense was made, and who was defrauded thereby, unless his name is unknown. It is sufficient to allege that the pretense was made to, or that the person defrauded was, a corporation, either private or municipal, a firm, or, where the pretense was by advertisement, the public generally." In the case of *State v. Turley*, 142 Mo. 403, 44 S. W. 267, the precise question was considered and decided, and it was there held that the indictment was sufficient. In the opinion in that case it is said *arguendo*: "No one would contend that if representations of the character which defendant is charged with making, were made in writing and addressed to a corporation, it would be necessary to allege that they were relied upon by some particular director or agent of the corporation, and the same rule applies when such statements and representations are verbal." And we may here add to what was there said, if the false pretenses were made in a letter addressed to the corporation *eo nomine*, to aver in the indictment that they were made to some particular individual might involve

[Pierson v. The State.]

a still more serious question of a variance between the allegata and probata. The same question was ruled on by the Supreme Cour of Minnessota in the case of *State v. Hulder*, 78 Minn. 524, 81 N. W. 532, and the indictment was held sufficient. Our own statute (section 1, Code 1907) provides that "the word 'person' includes a corporation as well as a natural person."

Our conclusion is that the indictment was not subject to the demurrer, and was properly overruled. Finding no error in the record, the judgment appealed from is affirmed.

Affirmed.

ANDERSON, MCCLELLAN, and MAYFIELD, JJ., concur.

Pierson v. The State.

False Pretence.

(Decided Feb. 9, 1909. 48 South. 813.)

Criminal Law; Former Jeopardy.—While, under the facts in this case, the state might have proceeded against the defendant under either sections 6920 or 6845, Code 1907, yet, if a prosecution is had under the latter section and the defendant acquitted, such acquittal was a bar to his further prosecution for obtaining the money, etc., under false pretenses.

APPEAL from Pike Law Court.

Heard before Hon. A. H. OWENS.

Ramon Pierson was convicted of obtaining money under false pretenses, and appeals. Reversed and remanded.

The affidavit, on which the trial from which this appeal was taken was held, is as follows (omitting formal charging part): "Before me, R. E. McLure, a justice of the peace in and for said state and county, personally

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appeared G. W. Henderson, who, being first duly sworn, deposes and says, on oath, that he has probable cause for believing, and does believe, that in said county and within 12 months before making this affidavit Ramon Pierson did falsely pretend to G. W. Henderson, with intent to defraud, that he was 21 years of age, and by means of such false pretense entered into a written contract to work and labor for the said G. W. Henderson, and thereby obtained from the said G. W. Henderson \$16 in money, of the value of \$16, the personal property of said G. W. Henderson," etc.

The special plea, which was stricken on motion of the solicitor, is as follows: "Now comes the defendant in the above-entitled cause and says in answer that he ought not to be further prosecuted on said cause, for that he has been tried and acquitted on said case in your honor's court, the law court of Pike county, Alabama, at the July term, 1908, on complaint sworn out by G. W. Henderson, before O. Worthy, a notary public and ex officio a justice of the peace, and made returnable to the law court of Pike county, said complaint being as follows [omitting the formal charging part]: 'G. W. Henderson, who, being duly sworn, says, on oath, that he has probable cause for believing and does believe that in Pike county, within 12 months before the making of this affidavit, Ramon Pierson, with intent injure or defraud his employer, G. W. Henderson, entered into a written contract for the performance of an act or service of said G. W. Henderson, and thereby obtained \$16 in money from the said G. W. Henderson, and with like intent, and without just cause, and without refunding such money, refused or failed to perform such act or service. [Omitting the formal conclusion and signature.] The defendant says that on this complaint he was tried in your honor's court at the July term, 1908,

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of the law court of Pike county, and acquitted of this charge in said court; that he is the identical Ramon Pierson that was charged in said complaint and acquitted in said law court of Pike county before your honor; and that G. W. Henderson was the identical G. W. Henderson that made the complaint in said court. The defendant further says that, he having been acquitted of this offense once in the law court of Pike county he ought not to be further prosecuted in this case. Wherefore he prays judgment," etc.

BOYKIN OWENS, for appellant. Counsel discusses assignments of error but without citation of authority.

ALEXANDER M. GARBER, Attorney-General, for the State. The plea of jeopardy falls for want of support in proof. The court's reading of the statute was permissible.—*Holly v. The State*, 75 Ala. 14. The objection to the verdict is not good.—*Washington v. The State*, 106 Ala. 58.

ANDERSON, J.—While the affidavit, in the case at bar, charges an offense (false pretense) under section 6920 of the Code of 1907, and the plea sets up that the defendant was acquitted of a charge (for violating a labor contract) under section 6845, the averments of the plea show the same parties, and that the essence of each offense was the fraudulent getting of \$16 by the defendant from G. W. Henderson. Whether the money was obtained through a fraudulent and false representation as to the defendant's age, or by fraudulently entering into a written contract, the gist of each offense was fraud in obtaining the money, in the absence of which there could be no conviction under either charge.—*State v. Vann*, 150 Ala. 66, 43 South. 357. The state would

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have the right to proceed under either statute; but, when one involves the essential ingredient of crime involved in the other, the conviction or acquittal of one is a bar to the other.—*Moore v. State*, 71 Alt. 307; *State v. Blewins*, 134 Ala. 214, 32 South. 637, 92 Am. St. Rep. 22; *O'Brien v. State*, 91 Ala. 25, 8 South. 560.

The trial court erred in striking the defendant's special plea, and the judgment of the said court is reversed, and the cause is remanded.

Reversed and remanded.

DOWDELL, C. J., and MCCLELLAN and MAYFIELD, JJ.,
concur.

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False Pretense.

(Decided Feb. 11, 1909. 48 South. 673.)

1. *Contracts; Conditional Sale; Execution; Attestation.*—One who receives a salary and has no interest in the goods sold other than the fact that he is the credit man and has charge of conditional sales of the firm, is not incompetent to witness the execution of the contract of conditional sale given to the firm.

2. *Same; Construction.*—The courts look to the purpose of a contract rather than the name given it by the parties in determining its real character.

3. *Sales; Conditional Sale; Removal of Stuff by Vendee.*—The contract in this case examined and held to constitute a conditional sale entitling the vendors to protection afforded by section 7342, Code 1907.

4. *Same; Offense; Claim.*—The use of the word, claim, under section 7342, Code 1907, is in its popular sense signifying a right to claim; a just title to something in the possession of or at the disposal of another.

5. *Trial; Directing Verdict.*—In a prosecution for removing furniture under a contract of conditional sale in violation of section 7342, Code 1907 where the contract is properly received in evidence as being within the terms of the statute, the court properly refused to direct the verdict on the theory that the offense was not comprehended by such section.

6. *Charge of Court; Unintelligible Instructions.*—Unintelligible instructions are always properly refused.

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APPEAL from Gadsden City Court.

Heard before Hon. ALTO V. LEE.

Sam Steele was convicted of violating section 7342, Code 1907, and he appeals. Affirmed.

The contract is in the following words: "State of Alabama, County of Etowah. Sam Steele has this day rented of Frank & Hagedorne the following property, to wit: Four mattresses, \$10; 3 beds, \$10; 1 table, \$3.50; 1 stove, \$15; 4 springs, \$13.50—of the agreed value of \$51.50, with interest from date, payable \$———cash, balance at the rate of \$3 per two weeks, which property I agree to keep at No. 22 Lake Front street, in Alabama City, and not to remove the same without the consent of said Frank & Hagedorne. The title to said property shall remain in said Frank & Hagedorne until the whole amount of said lease has been paid. In case I fail to make any payment, the whole amount shall become due, and they shall have the right to sue and recover the same; and in case I fail to make any of the payments they shall have the right to take possession of the property without legal process, and all payments made shall be applied for the use of said merchandise. I further agree that each and all payments shall be placed to my credit as payment on this lease, or any other goods which I may owe for to said Frank & Hagedorne by open account or by other lease, and I shall have no title to this lease until my account shall have been settled in full." Then follows the waiver of exemptions and agreement to pay attorney's fees. Signed: "Sam Steele," by mark, and witnessed by Lee Freibaum. The objections to the introduction of this lease sufficiently appear in the opinion.

The following charges were refused to defendant: (1) General affirmative charge. (2) "The court charges the jury, before you can convict the defendant, the state

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ments must show you beyond a reasonable doubt that defendant under a written instrument, lien, contract by law, for rent or advances, or any other lawful or valid claim, verbal or written, with knowledge of the existence thereof for the purpose of hindering or delaying Frank & Hagedorne. (3) When the defendant moved the goods as shown by the evidence, had at the time a purpose to hinder or delay or defraud Frank & Hagedorne."

CATO D. GLOVER, for appellant. No brief came to the Reporter.

ALEXANDER M. GARBER, Attorney-General, for the State. The charges do not appear to have been requested in writing and the presumption will be indulged that they were not so requested.—*Henderson v. The State*, 137 Ala. 83. In any event, they were requested in bulk, and contained the affirmative charge.—*Verberg v. The State*, 137 Ala. 73. A verbal contract of conditional sale is valid in Etowah County.—*Dudley v. Abner*, 52 Ala. 572; *Goodgame v. Sandwich*, 140 Ala. 247.

SAYRE, J.—The defendant was indicted and convicted for removing certain articles of house hold furniture in violation of section 7342, Code 1907. Defendant had purchased the articles in question from the firm of Frank & Hagedorne, and the relations of the parties in respect to the property were evidenced by a paper writing, signed by the defendant, which, beginning with a recital that the vendors had "rented" the property to defendant, provided that the title to the property should remain in the vendors until the whole amount of the purchase money was paid, the same to be paid in specified installments, and in case there was failure to

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make any payment the vendors reserved the right to take possession without legal process. There was further provision that all payments should be placed to the credit of defendant as payments on the "lease," as it is in places termed, or any other goods for which he might owe the vendors by way of open account on any other "lease," and that the defendant was to have no title to the "lease" until his account should be settled in full.

Defendant executed the writing by making his mark, which was witnessed by one Freibaum, who was book-keeper and credit man for the vendors, and, as the bill of exceptions states, the evidence showed that he controlled all matters pertaining to the sale of the furniture in question, but was a man on salary and had no pecuniary interest in the transaction. The writing was admitted to the consideration of the jury over the objection and exception of the defendant. Freibaum was a mere agent, and had no such direct and immediate interest in the contract as would render him incompetent to attest the execution of the writing.—*Sowell v. Bank of Brewton*, 119 Ala. 92, 24 South. 585.

Other objections to the admission of the writing appear to have proceeded on the idea that the vendors, having retained the legal title, had a general property in the goods, which was the subject of larceny or embezzlement, and no such mere claim as entitled them to the protection afforded by section 7342. In determining the real character of a contract, courts look to its purpose rather than to the name given to it by the parties. The contract in question was a contract of conditional sale, the effort to disguise it as a lease to the contrary notwithstanding.—6 Am. & Eng. Enc. Law, 447. The retention of title by the vendors did not make them the absolute owners of the property.—*Bingham v. Vandergrift*

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93 Ala. 283, 9 South. 280. It was, at most, a form of security for the payment of the purchase money.—*Tanner v. Hall*, 89 Ala. 628, 7 South. 187. The contract committed the property to the defendant for himself, and not for the vendors. He had the rights of user and enjoyment which are essential characteristics entering into the legal notion of property. The contract did not contemplate a redelivery of the property to the vendors so long as its terms were observed, and its character was fixed upon its execution and delivery. If honestly entered into by the defendant, it did not reserve to the vendors a property right which is protected by the statutes against larceny; nor did it confer possession on the defendant as clerk, agent, servant, or apprentice of vendors, so as to render him amenable to the statute against embezzlement.

The word "claim" in the statute is used in its popular sense, and signifies a right to claim; a just title to something in the possession or at the disposal of another.—*Century Dictionary*. In *May v. State*, 115 Ala. 14, 22 South. 611, it was ruled that a mortgagee, after the law day of the mortgage, was a person having a claim to property embraced in the mortgage under a written instrument, within the language of section 3835, Code 1886, now section 7342, Code 1907. Accordingly, we hold that the objection taken by the defendant was not well taken.

The general affirmative charge, refused to the defendant, seems to have been intended to reiterate the objections which had been urged to the writing as evidence. That writing properly admitted, the case was clearly one for the jury. Two other charges refused, as they appear in the transcript of the record, are unintelligible, and were properly refused.

Affirmed.

DOWDELL, C. J., and ANDERSON, McCLELLAN, and MAYFIELD, JJ., concur.

[Andrews v. The State.]

Andrews v. The State.***Murder.***

(Decided Feb. 4, 1909. 48 South. 858.)

1. *Criminal Law; Jurisdiction; Transfer of Causes; Bessemer City Court.*—Where the transcript from the criminal court of Jefferson county as copied into this record discloses that on motion of defendant an order was entered on a stated date transferring this case to the city court of Bessemer, and ordering all papers in the case, transferred to the Bessemer city court, together with a transcript of the minutes of the Jefferson criminal court, showing the organization of that court, and its grand jury that returned the indictment, it sufficiently appears from the record that the case had been transferred from the Jefferson criminal court to the Bessemer city court on a specified date, giving said city court of Bessemer jurisdiction to hear and determine the cause under section 16, Acts 1900-01, p. 1854.

2. *Appeal and Error; Review; Record; Organization of Court.*—Although the name of the trial court was not stated at the head of the minute entry showing the arraignment of the accused and fixing the date of his trial, yet, a certiorari to the transcript which showed that the person who was judge of the Bessemer city court presided at the trial, and the certificate of the clerk to the transcript showed that an order then made was made by the city court of Bessemer, the organization of the trial court was sufficiently shown.

3. *Jury and Jurors; Empanelling; Excusing for Cause.*—For good cause shown the court may, in its discretion excuse certain persons summoned as jurors in empanelling regular jurors at the organization of the court.

4. *Same; Qualification; Residence.*—Section 33, Acts 1900-01, p. 1870, requires that petit jurors in criminal cases shall be drawn and summoned from the district over which the court has jurisdiction, and it is error, to place on a jury a person living outside the district; so in completing a jury for the trial of a capital case, it is error to place on the jury a person living more than two miles from Bessemer, although he lives within two miles of the county court house at Birmingham.

5. *Same; Empanelling.*—It is not error to exclude testimony as to the manner in which a petit jury is drawn, since section 7528, Code 1907, makes the requirements regarding the selection of jurors directory merely, so that no objection can be taken to a venire for a petit jury except for fraud in drawing or summoning.

6. *Witnesses; Contradiction; Corroboration.*—Where a witness has been permitted without objection to testify as to wounds he has received during the difficulty, and the defendant had sought to discredit his testimony by showing, from the position of the wound,

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that witness was facing defendant with his pistol in his hand, pointed at the defendant, it was proper to permit the witness to show his wounds to the jury.

7. *Same; Cross Examination; Character.*—While the character of a witness or defendant cannot be proven by particular acts, and good character cannot be rebutted by proof of particular acts, yet, a witness may be asked on cross examination as to whether or not he has heard of certain particular acts to test the credibility of his accuracy; and hence, witnesses who have testified to defendant's good character may be asked on the cross as to how many fights they have heard of accused having, and as to whether or not he is regarded by the citizens of the community as a dangerous citizen.

8. *Same; Examination; Leading Question.*—A question "Tell the jury if you saw the pistol balls near the watering tub" is objectionable as being leading, and as assuming as a fact that the pistol balls were near the tub.

9. *Homicide; Evidence; Clothing.*—The clothing worn by deceased at the time of the killing, are proper subjects of evidence and may be introduced.

10. *Same; Identification of Weapon.*—It was competent to show the character and condition of pistols introduced on the preliminary examination for the purpose of aiding the jury in determining whether they were the same pistol, and in the same condition as when introduced on the preliminary trial.

11. *Same.*—The statement not being in the nature of a confession it was competent to show that shortly after the shooting the defendant stated that he did not know who did the shooting.

12. *Same; Instructions; Ignoring Defense.*—Where there was evidence tending to show self defense, a charge asserting that if the jury believed that the defendant killed the deceased, then defendant was guilty and the next thing to do was to fix the degree of punishment, ignored the evidence of self defense, and was improperly refused.

13. *Same; Elements; Malice.*—If there is a reasonable doubt as to whether the killing was done maliciously, a defendant cannot be convicted of murder.

14. *Same; Instructions; Elements of Offense.*—A charge asserting that the state must show beyond a reasonable doubt, all the constituents of the crime charged before accused is called upon to explain any circumstances connected therewith or to make any defense there-to, leaves to the determination of the jury a question of law as to what elements constitute the offense, and the evidence might show the commission of a lesser degree of crime covered by the indictment, although the evidence might not show the constituents of the crime charged.

15. *Same; Self Defense.*—A charge asserting that if the defendant was attacked by the deceased with a deadly weapon in his own livable stable, defendant was under no duty to retreat from his antagonist, is properly refused as misleading.

16. *Same; Duty to Retreat.*—A charge asserting that where one without fault is attacked by another, and he kills his assailant, if the circumstances furnish reasonable grounds for apprehending a design to take his life or do him some great bodily harm, and for

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believing the danger imminent, and that such design will be accomplished, the homicide is justifiable, although it may turn out that the appearance was false and that there was in fact no such design nor any danger of its being accomplished, fails to hypothesize the defendant's belief that he was in imminent peril, and does not mention the matter of domicile or retreat.

17. *Same*.—Charges asserting that one feloniously attacked in his own place of business, is not bound to retreat even though by so doing he might secure his safety, but may stand his ground and take his assailant's life if it becomes necessary, and the homicide is justified; that homicide is justifiable when committed by one into whose place of business the deceased was endeavoring in a violent manner to force himself with the intention of unlawfully assaulting the owner thereof, are each properly refused as argumentative and misleading.

18. *Same; Self Defense; Apprehension of Danger*.—If one is attacked by another in his own house or place of business in such a manner as would raise in the mind of a reasonable man the belief that he is in imminent danger of great bodily harm, and such an one is so impressed then he is under no obligation to retreat, and will be justified in taking his assailant's life, provided he was without fault in bringing on the difficulty.

19. *Same; Defense of Person; Burden of Proof*.—In a prosecution for homicide the burden is on the state to show that the defendant was in fault in bringing on the difficulty and is not on the defendant to show that he was free from fault.

20. *Charge of Court; Reasonable Doubt*.—A charge asserting that the law demands that the minds of the jurors be so satisfied by the evidence that no reasonable doubt exists in them, but that their finding is correct, and accused guilty of the charge, and that if they are not satisfied in such a way, they should not convict, is involved and uncertain and properly refused.

21. *Same; Duty of Judge*.—It is the duty of the judge in charging the jury to give the law applicable to all theories presented by the testimony, and if he recapitulates the evidence on the one side to recapitulate it also on the other, and not to indicate by the manner or matter of the charge what are his own views as to the effect of the testimony.

22. *Same; Invading Jury's Province*.—A statement by the court that the evidence on the part of the state goes to show that the defendant fired all three of those shots, goes beyond a statement of the tendencies of the evidence and becomes invasive of the province of the jury; and when the state's evidence tended to show that the decedent's pistol was fired once, the charge was not supported by the evidence.

23. *Appeal and Error; Harmless Error; Admission of Evidence*.—Where a witness answered a question objected to by stating that it might or might not, the overruling of the objection is harmless.

24. *Same; Recalling Witness*.—Where a witness is recalled by the state and the court refuses to permit him to restate what he has just stated on cross examination, no injury is done the defendant.

25. *Evidence; Demonstrative Evidence*.—A witness having testified that he was at the place of the killing and that another witness who

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had testified that he was there, in fact was not there, it was competent for the witness to state whether he could have seen such other witness, had he been present.

26. *Same; Character of Accused; General Character.*—A witness having testified that he had known the defendant sixteen or seventeen years, and knew his general character, and that it was good, answered in response to a question as to what he based his estimate on, that he had known accused and that accused had worked for him a good while, and had access to all his valuables, that he never missed anything, and that accused had always been obliging and polite, but that he did not base his estimate upon that alone as he had never had any occasion to think the defendant's character bad. Held, the further facts testified to by the witness was not sufficient to take from the jury the testimony that he knew defendant's character and that it was good, hence, it was error to exclude such testimony.

27. *Same.*—Testimony of good character generally, not given from the witness' knowledge of the defendant's general character, but based on the general observation of the defendant by the witness is properly excluded.

APPEAL from Bessemer City Court.

Heard before Hon. WILLIAM JACKSON.

John Andrews was convicted of murder, and he appeals. Reversed and remanded.

The record shows the organization of the criminal court of Jefferson county, the drawing of the grand jury for that term, and the organization of the city court of Bessemer. It is further shown by the certiorari that the city court of Birmingham was organized and the grand jury ordered to turn in report of May 14, 1906. It further shows that on the 17th day of September, 1907, an order was entered in the criminal court of Birmingham, transferring said cause from the criminal court of Jefferson county to the city court of Bessemer, and an order to transmit all papers in the cause to the city court of Bessemer, together with a transcript of the minutes showing the organization of the criminal court of Jefferson county and of the grand jury. Another order is shown, made on December 9, 1907, in the city of Bessemer, for drawing jurors to try capital cases in the city court of Bessemer, beginning on the 6th day of Janua-

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ry, 1908. The indictment appears to have been preferred and filed on the 21st day of April, 1906, and a bond made by the defendant for his appearance at the next term of the criminal court of Jefferson county, and from term to term, etc., approved November 24, 1906. The certificate of the clerk of the criminal court of Jefferson county transferring the cause, and the minutes, are dated May 5, 1908.

It was shown that the juror Lynn did not live within the district over which the city court of Bessemer had jurisdiction. In impaneling the regular jurors for the week in which the trial of this cause was set, for good cause shown, the court excused Brown and Betts, who had been summoned as jurors. The defendant entered a motion to quash a venire, and in that connection offered to show by Capt. Crook that the jurors were drawn from the box before any were selected for grand or petit jurors, and that the grand jurors were then selected and placed upon the grand jury venire, and the names remaining were placed upon and made to constitute the venire for the petit jury.

The record shows that Lawrence Lipscomb was next called by the defendant, and stated that he was engaged as clerk at the ice factory, and had been living in Bessemer 18 or 20 years, and knew the defendant's general character to be good. On cross-examination he stated that he based this opinion on his general observation of defendant, and on motion of the state this evidence was excluded. The same witness was asked as to the character and condition of the pistols which were introduced in evidence on the preliminary trial as the pistols used by the different parties to the shooting; but on objection by the state the questions and answers were excluded. On the cross-examination of the defendant, he was asked by the state concerning various difficulties he

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had been in, and in that connection was asked the question which is set out in the opinion, to which objection was made and overruled.

The following charges were refused to the defendant:

“(1) If there is a reasonable doubt as to whether the killing was done with malice, the defendant cannot be convicted of murder at all.

“(2) The court charges that the state must show by the evidence beyond a reasonable doubt all the constituents of the crime charged before the defendant is called upon to explain any circumstances connected therewith, or to make any defense.

“(3) If the defendant was attacked in his livery stable by the deceased with a deadly weapon, the defendant was under no duty to retreat from his antagonist.

“(4) The court instructs the jury that one feloniously assaulted in his own place of business is not bound to retreat, even though by so doing he might secure his safety; but he may stand his ground, and take his assailant's life if it becomes necessary, and the homicide is justified.

“(5) The court instructs the jury that homicide is justifiable when committed by one into whose place of business deceased was endeavoring in a violent manner to force himself, with the intention of unlawfully assaulting the owner thereof.

“(6) The evidence which shows the killing of one person by another with a deadly weapon may rebut the presumption of malice arising from the use of such weapon.

“(7) The court instructs the jury that where one without fault is attacked by another, and he kills his assailant, if the circumstances furnish reasonable ground for apprehending a design to take his life or do him some great bodily harm, and for believing the danger imminent, and that such design will be accomplished, the

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homicide is justifiable, though it may turn out that the appearance was false, and that there was in fact no such design, nor any danger of its being accomplished.

“(8) The law demands that your minds be so satisfied by evidence that no reasonable doubt exists in you but that your finding is correct, and the defendant guilty of that charge; and if you are not satisfied in this way you should not convict.”

The other charges requested were on self-defense, and need not be specially set out.

ALLEN & BEIL, and T. T. HUEY, for appellant. The entry intended to be an arraignment of the defendant as well as an order fixing day for the the trial purports to have been made by the city court of Bessemer, and as no other order was made by the city court of Bessemer in the cause, it does not affirmatively appear that this court has jurisdiction to make it, and it not so appearing, the order was of no effect.—*Spier v. The State*, 69 Ala. 159; *Lominack v. The State*, 39 South. 676. Under the Special Acts of Jefferson county, it must affirmatively appear as to how the jury was drawn for the trial of a capital case. —*Scott v. The State*, 141 Ala. 39; *Kennebrew v. The State*, 132 Ala.; *Barton v. The State*, 115 Ala. 1; *Bankhead v. The State*, 14 Ala. 14. The 7th and 8th grounds of the motion are sufficient and should have been sustained.—*State v. Bell*, 115 Ala. 25. The evidence certainly justifies the inference that Millstead Justices & Johnson, were acting in unison, aiding and abetting each other.—*Smith v. The State*, 136 Ala. 1; *Thomas v. The State*, 30 South. 391. Under the facts in this case the defendant had a right to defend himself.—*Naugher v. The State*, 105 Ala. 26; *Crawford v. The State*, 112 Ala. 1; *Pugh v. The State*, 132 Ala. 1. The judge went beyond his province in his charge to the jury

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as to the tendencies of the evidence.—*Line v. The State*, 124 Ala. 1; *Greenwood v. The State*, 99 Ala. 501; *Poe v. The State*, 87 Ala. 65. Counsel discuss assignments of error as to evidence, but without citation of authority.

ALEXANDER M. GARBER, Attorney-General, and THOMAS W. MARTIN, Assistant Attorney-General, for the State. The records affirmatively showed the organization of the city court of Birmingham, the finding and return of the indictment, the order of removal made at the instance of defendant, and proper orders after its removal.—Acts 1890-1, p. 561. The court did not err as to the evidence on motion to quash indictment.—*Thompson v. The State*, 122 Ala. 12; Sec. 7572, Code 1907. The court did not err in reference to the excusing of jurors.—Sec. 5016, Code 1896; *Amos v. The State*, 96 Ala. 120. The witness was properly permitted to exhibit the wounds on his body.—*King v. The State*, 100 Ala. 85. The court did not err in reference to the admission or rejection of other testimony.—*Roberts v. The State*, 68 Ala. 516; *Holly v. The State*, 75 Ala. 14; *Waters v. The State*, 117 Ala. 108. The court did not err in reference to the testimony as to character.—*Jackson v. The State*, 78 Ala. 471; *Griffin v. The State*, 90 Ala. 583; *Holmes v. The State*, 88 Ala. 26. The court properly refused the defendant's requested charge.—*Martin v. The State*, 119 Ala. 1; *Bouldin v. The State*, 102 Ala. 78; *Whatley v. The State*, 144 Ala. 68; *Matthews v. The State*, 136 Ala. 47; *Lewis v. The State*, 88 Ala. 11; *Mitchell v. The State*, 133 Ala. 65; *Harrison v. The State*, 20. The constituents of self defense should be set out.—*Mann v. The State*, 134 Ala. 1.

SIMPSON, J.—The appellant was convicted of the crime of murder, and his punishment fixed at death.

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The city court of Bessemer was created by the act approved February 28, 1901 (Acts 1900-01, p. 1858; Loc. Laws Jefferson Co. [by Weakley] p. 115). Section 16 of that act provides that cases then or thereafter pending in the criminal court of Jefferson county "may be, by consent of the parties thereto, transferred to said city court of Bessemer;" and section 25 provides that in all cases where a party is arrested on an indictment, "for an offense arising or committed by him in said district, * * * if said warrant or capias or other process is returnable to the criminal court of Jefferson county, and the defendant makes bond for his appearance, his case shall be removed to said city court of Bessemer, and the papers shall thereupon become returnable to said city court of Bessemer, and the case triable there." Section 26 provides that, in all cases where the defendant fails or refuses to make bond at the time of his arrest for an offense committed in said district, he shall be confined in the county jail at Birmingham, and his case stand for trial in the criminal court of Jefferson county, provided that "if any person who is confined in said jail for an offense committed in said district, within the jurisdiction of said city court, shall make a good and sufficient bond for his appearance at the said city court, to answer the charge preferred against him, it shall be the duty of the sheriff to immediately return said bond to the clerk of the criminal court of Jefferson county, and the case shall thereupon stand removed to the city court," and it shall be the duty of the clerk to transmit papers, etc.

It is first insisted by appellant that the record shows that the indictment in this case was found in said criminal court of Jefferson county, in April, 1906, and, as shown by the transcript, was not certified to the city court of Bessemer until the 14th day of February, 1908.

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after this case had been tried, and the defendant convicted, on the 6th day of January, 1908, and that consequently, at the time of trial, the city court of Bessemer was without jurisdiction to try this case. The transcript from the criminal court of Jefferson county, in the record, shows that, on the motion of the defendant, his case was transferred to the city court of Bessemer on September 17, 1907. We think it sufficiently appears that this case was transferred to said city court before the trial of the same, and the indictment was in court.—*Dudley v. Birmingham, etc., Co.*, 139 Ala. 453, 461, 36 South. 700. The court had jurisdiction. In the case of *Rose v. State*, 117 Ala. 77, 79, 23 South. 638, 639, the record failed to show “anything touching the transfer of this cause.”

The organization of the trial court sufficiently appears from the transcript brought up by certiorari. While it is true that the name of the court is not stated at the head of the minute entry as to the arraignment of the defendant and the fixing of the day for his trial, yet it shows that Hon. Wm. Jackson was presiding, and in connection with the certificate of the clerk at the end of the transcript it sufficiently shows that the order then made was by the city court of Bessemer.

The return to the certiorari shows also that the special jurors were drawn according to law.—Loc. Acts Jefferson Co. (Ast Feb. 11, 1901) 705. It appears from the record that the excusing of the jurors Brown and Betts by the court was upon the impaneling of the juries at the organization of the court, which was within the discretion of the court, and not error.

Section 33 of the act creating said city court of Bessemer provides that the petit jurors “shall be drawn and summoned from said district.” Consequently it was error to place the juror Lynn on said jury, who was shown to live outside said district.

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The act provides (section 33) that, "in completing the juries for the trial of any capital case, the judge of said city court shall draw, under the provisions of this act, the names of persons subject to jury duty, residing within two miles of the place where said court is held in the city of Bessemer." Consequently there was no error in placing upon the jury Lon Tyler, who lived more than two miles from the courthouse at Birmingham, but within two miles of Bessemer; but there was error in placing upon the panel Bob Vance, who resided within two miles of the courthouse at Birmingham, but not within two miles of Bessemer.

But there was no error in sustaining the objections to the questions propounded by defendant to the witness Capt. Crook as to the manner of drawing the juries, as the provisions of law in regard to the selection of jurors are merely directory, and no objection can be made, except for fraud.—Code 1896, § 4997; Code 1907, § 7256; *Baker v. State*, 122 Ala. 12, 26 South. 141; *Childress v. State*, 122 Ala. 21, 26 South. 162.

The witness Millstead, in relating the *res gestæ*, had been allowed without objection to testify as to the wound he received in his thumb and side during the difficulty, and it was sought by the defendant to discredit his testimony, by showing, from the position of the wound, that he was facing the defendant, with his pistol in his hand, pointed at defendant. It was not error to allow him to show the wounds received by him. It is true the defendant was not on trial for shooting him; but the course of the examination, just preceding, by the state and defendant, made this testimony pertinent.

There was no error in allowing the clothing which was worn by the deceased to be introduced in evidence.—*Holley v. State*, 75 Ala. 14.

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There was no error in overruling the motion by the defendant to exclude the testimony of the witness Stallings. No objection was made to the questions, and no reason is assigned for excluding the testimony.

On cross-examination the state asked the witness Dr. Carter, who had testified to the good character of the defendant, "How many fights do you recall that he has had?" and he answered that he had heard of but two. The defendant objected to the question, and moved to exclude the answer, both of which were overruled. While the character of a witness or of the defendant cannot be proved by particular acts, nor can the evidence of his good character be rebutted by proof of particular acts, yet, for the purpose of testing the credibility or accuracy of the character witness, he may be asked, on cross-examination, whether or not he has heard of particular acts.—*De Arman v. State*, 71 Ala. 351, 361; *Jones v. State*, 76 Ala. 9, 15, 16; *Jackson v. State*, 78 Ala. 471, 472; *Moulton v. State*, 88 Ala. 116, 119-20, 6 South. 740, 16 Am. St. Rep. 52; *King v. State*, 89 Ala. 146, 7 South. 750; *Lowery v. State*, 89 Ala. 45, 49, 13 South. 498; *Thompson v. State*, 100 Ala. 70, 71, 14 South. 878; *Goodwin v. State*, 102 Ala. 88, 98, 45 South. 571; *Smith v. State*, 103 Ala. 57, 70, 15 South. 866; *Terry v. State*, 118 Ala. 80, 86, 23 South. 776; *Carson v. State*, 128 Ala. 58, 60, 29 South. 608; *Williams v. State*, 144 Ala. 14, 18, 40 South. 405. There was no error in overruling the objections to this question, and the three following ones, of the same tenor. The following question, also, as to whether the defendant had not been regarded by the citizens of the community as a desperate character, was proper, on cross-examination.

As the answer to the question to the witness Dr. Winters, whether a ball entering clothing would make a hole about the size of a bullet, was, "It might, and it might

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not," the overruling of the objection to that question was immaterial. The question as to whether the hole showed he was shot from behind was not answered, except by showing that the witness could not tell anything about it. Hence there was no error, injurious to defendant, in overruling the objection to the same.

The recalling of Dr. Winters by the state did not result in any injury to the defendant; hence he cannot complain. Nor was there any injury to him in the refusal to permit the witness to state over, on redirect examination, what he had just stated on cross-examination. The witness Hannon stated that he was in a stall in the stable, and that Babe Justice was not there. He was asked by the defendant, "you could have seen him?" The state objected, and the court sustained the objection. This was error. The evidence shows that "Babe Justice" was another name for Tom Justice, who had testified. and it was proper to ask the witness whether he could have seen him, if he had been there.—*Tesney v. State*, 77 Ala. 33.

The witness Moody, on behalf of the defendant, stated that he had lived in Bessemer 18 or 19 years, had known the defendant 16 or 17 years, knew his general character, and that it was good. He also made other statements about the defendant's honesty, politeness, etc., about having business dealings with him, and testified that witness was a real estate man and talked with a great many people, etc. On being asked on what he based his opinion of his character, he stated that "the defendant had worked for him a good while, had had access to all his valuables," but that "he had never missed anything, and defendant was always exceedingly polite and obliging." The state asked him, "Is that what you base your opinion on?" and he replied, "Not altogether; I never had any occasion to think his character was bad."

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The state moved to exclude the testimony; and the court said, "Gentlemen, you are not to consider the testimony of this witness." This was error. The statement of the further facts was not sufficient to take from the jury the testimony of the witness that he knew the general character of the defendant, and it was good. The statement of the court excluded all of the testimony of the witness from the jury.

There was no error in excluding that part of Lipscomb's testimony preceding the exception, as he did not testify to a knowledge of the defendant's general character, but stated that he based his opinion on his general observation of him.

The question to the witness Huey, "Tell the jury if you saw the pistol balls near the watering tub," was objectionable, as being a leading question, and also as assuming the fact that the pistol balls were there. Consequently there was no error in sustaining the objection to it.

Upon another trial the defendant should be permitted to prove the character and condition of the pistols which were introduced on the preliminary trial, in order that the jury may determine whether they were the same pistols and in the same condition as when introduced in this trial.

There was no error in asking the witness Huey, on cross-examination, whether he had known of the defendant's having been in other troubles. See authorities *supra*.

The court erred in overruling the objection to the question by the state, "And you jumped on an old man by the name of Price down there?" See cases *supra*.

There was no error in overruling the objections to the question to the witness Patton as to statements made by the defendant, shortly after the shooting, that he did not

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know who did the shooting. This was not in the nature of a confession; and, if the intention was to contradict the witness, no predicate was laid.

In charging the jury, it is the duty of the judge to give the law applicable to all theories presented by the testimony and, if he recapitulates the evidence on one side, to recapitulate it also on the other side, and not to indicate, by the matter or manner of the charge, what his own views are as to the effect of the testimony.—1 *Blashfield* on Instructions to Juries, p. 139, § 56; 12 Cyc. 612, 613; *Banks v. State*, 89 Ga. 75, 14 S. E. 927; *State v. Gilmer*, 97 N. C. 429, 1 S. E. 491; *Aaron Co. v. Hirschfield*, 89 Ill. App. 205; *Wright, et al. v. Central R. R. & B. Co.*, 16 Ga. 38; *State v. Moses*, 13 N. C. 452;; *Smith v. State*, 68 Ala. 425, 432. We cannot say whether the oral charge in this case was liable to the objection that it summed up the evidence on one side, and not on the other, as the entire oral charge is not set out in the bill of exceptions; but we are disposed to think that the manner of stating the evidence indicated pretty clearly to the jury the judge's own impressions of the weight and effect of the testimony, and that it was an invasion of the province of the jury. However, the statement that "the evidence on the part of the state goes to show that this defendant fired all three of those shots" goes beyond the rule laid down by our courts, to the effect that the judge may, state the tendency of the evidence on both sides (*White v. State*, 111 Ala. 92, 97, 21 South. 330); and it is also erroneous because some of the evidence produced by the state tends to show that the pistol of the deceased was fired once. It was erroneous, also, to charge (in the oral charge) about the shooting of Milstead, as the defendant was not on trial for shooting him. This court has also condemned "an argument by the court against the defendant on the evidence."—*McIntosh v. State*, 140

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Ala. 137, 141, 37 South. 223. Without passing upon that phase of the oral charge, we merely cite these authorities for the future guidance of the court.

The court erred in charging, "If you find this defendant killed Taylor Johnson, then this defendant is guilty. The next thing for you to do is to fix the degree of punishment." This ignored entirely the defense of self-defense, which the evidence for the defendant tended to sustain.

The court erred in refusing to give charge 1, requested by the defendant.

There was no error in refusing to give charge 2, requested by the defendant. "What are elements of the offense is a question of law for the court."—*Whatley v. State*, 144 Ala. 69, 39 South. 1014, 11th. h. n. Moreover, although the evidence might not show "the constituents of the crime charged," yet it might show the commission of a lesser degree of crime, covered by the indictment.

Charge 3, refused to the defendant, was properly refused, as it was misleading. The same is true of charges 4, 5, and 6; and these are argumentative as well.

There was no error in the refusal to give charge 7. It failed to hypothesize the belief of the defendant that he was in imminent peril, and also failed to mention either the matter of retreat or domicile.

Charge 8 is involved and uncertain in its meaning, and was properly refused.

Without noticing specifically each of the other charges which were requested by the defendant and refused by the court, it is sufficient to say that if one who is free from fault in bringing on the difficulty is attacked by another, in his own house or place of business, in such a manner as would raise in a reasonable mind the belief that he is in imminent danger of great bodily harm, and he is so impressed, he is not under any obligation to re-

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treat, but may take the life of his assailant, and be justified under the law. While he must be without fault, yet the burden is not on him to show freedom from fault, but on the state to show that he was not free from fault.

The judgment of the court is reversed, and the cause remanded.

Reversed and remanded.

TYSON, C. J., and DENSON and MAYFIELD, JJ., concur.

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Murder.

(Decided Feb. 18, 1909. Rehearing denied April 6, 1909.
49 South. 108.)

1. *Jury; Venire; Illegality.*—The fact that a capital case set for trial for the second week of court was passed to the succeeding week, did not render the special venire drawn when the case was set, illegal.

2. *Same; Qualifications; Prior Service.*—Under sections 7247 and 7270, Code 1907, regular jurors drawn for the week in which a capital case is set, are not competent as jurors for the trial of such case upon its being passed to a subsequent week of the term, although they were ordered back to serve only for the trial of this special case, during such subsequent week, since they constitute a part of the regular venire and not of the jurors specially drawn.

3. *Charge of Court; Covered by Instructions Given.*—It is not error to refuse instructions substantially covered by written instructions given. (Mayfield, J., dissents.)

APPEAL from Covington Circuit Court.

Heard before Hon. H. A. PEARCE.

J. Finley Howard was convicted of murder in the second degree, and he appeals. Reversed and remanded.

It seems from the record that the case was called, the defendant arraigned, and his case set for the second week of court, and an order was entered by the judge drawing 50 men as a special venire, which, together with the ju-

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rors summoned for that week of court, should constitute the venire for the trial of the cause. The case was passed until a subsequent day of the same week, and when reached on that date was passed until a day of the following week; the court ordering that the 28 jurors regularly summoned and impaneled for the week in which the case was originally set should attend the following week for the purpose of participating in the trial of this case. Motion was made to quash the venire on this ground, and as each of said 28 regular jurors were placed upon the defendant he objected to being required to pass upon them as jurors for the trial of this cause.

FOSTER, SAMFORD & PRESTWOOD, HENRY OPP, ALBRITTON & ALBRITTON, and J. M. CHILTON, for appellant. The court erred in refusing the motion to quash the venire and in putting upon the defendant the 28 jurors summoned as regular jurors for the second week of court.—Secs. 7265, 7247, 7263, 7840, Code 1907. The court should have given charge 1 asked and refused.—*Brown v. The State*, 118 Ala. 111. The court should have given charge 37.—*Jarvis v. The State*, 138 Ala. 17; *Walker v. The State*, 45 Ala. 640. The facts stated in the petition are sufficient on which to base an application for a change of venue.—*Birdsong v. The State*, 47 Ala. 68; *Scams v. The State*, 84 Ala. 412; *Posey v. The State*, 79 Ala. 494; *Byers v. The State*, 105 Ala. Mere expressions of opinions in affidavits opposing an application for a change of venue are of no value.—*Scams v. The State*, *supra*; *Birdsong v. The State*, *supra*.

ALEXANDER M. GARBER, Attorney General, and THOMAS W. MARTIN, Assistant Attorney General, for the State.

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ANDERSON, J.—The trial court did not err in overruling the defendant's motion to quash the venire. The order of the court complied with the statute.—Section 7265 of the Code of 1907. The case was set for trial during the same week of the setting of same, and the special venire drawn, together with the panel organized for said week constituted the venire. The fact that the case was continued over to the next week before the trial was entered into did not render the venire illegal, though as intimated in the case of *Thomas v. State*, 94 Ala. 75, 10 South. 432, the court could have well reset the case and ordered another venire. The regular jurors, as fixed by the statute, to constitute a part of the venire to try a capital case, are those either organized when the case is set for the same week or those drawn when set for a subsequent week; that is, those organized as drawn for the week during which the case is set for trial and not the week when the case may be actually tried.—*Thomas v. State*, 94 Ala. 75, 10 South. 432; *Gerald v. State*, 128 Ala. 6, 29 South. 614. While these cases hold that the continuing of the case over to a week succeeding the one for which it was set for trial before entering into same did not render it necessary to draw a new venire, this case presents a question not directly raised or considered in said cases. The venire may have been legal, and should not have been quashed; but did it contain incompetent jurors who were improperly put upon the defendant over his objection? Not jurors who were incompetent when the venire was drawn, but who became incompetent because of the action of the court in causing them to serve the succeeding week.

Section 7247 of the Code of 1907 provides that no person shall be competent to serve on a petit jury more than one week in any year, unless they are continued over to a succeeding week, because actually engaged in a trial

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submitted to them during the week of their service. It is true this statute excepts such persons as may be "*especially summoned to serve as jurors in a capital case.*" (Italics supplied.) But the regular panel in the case at bar were not "specially summoned to serve," and only became a part of the venire to try same because the week fixed for the trial thereof was the week for which they were organized and serving as regular jurors. Having served the previous week as regular jurors, they became incompetent to serve as such a subsequent week. It is true they were ordered back only to serve the succeeding week upon the venire of this particular case; but they became a part of the venire as regular jurors, and not because they were "specially summoned to serve" as a part of the special venire. These jurors, being incompetent, should not have been put upon the defendant, as it was the imperative duty of the court to have peremptorily excused them as their names were drawn in the organization for trial.—Section 7270 of the Code of 1907. Whether the failure to do this was reversible error, unless the point was taken by the defendant, we need not decide, as it was not waived, for each of said regular jurors were objected to by the defendant. As heretofore stated, this point was not raised nor directly considered in the *Thomas* and *Gerald Cases*, *supra*, and they are not, therefore authorities against the present holding. The trial had not been entered into during the week from which it was carried over.—*Holland's Case*, 107 Ala. 412, 18 South. 170, 54 Am. St. Rep. 101. Moreover, the statute (section 7247) requires that the jurors must be actually engaged in a trial submitted to them, in order to be competent to try same the succeeding week.

As this case must be reversed, it is needless for us to determine whether or not the trial court erred in refusing a change of venue.

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The trial court committed no error in ruling upon the evidence and charges. The charges refused the defendant were either bad or had been covered by given charges.

The judgment of the circuit court is reversed, and the cause is remanded.

Reversed and remanded.

DOWDELL, C. J., and SIMPSON and DENSON, JJ., concur.

MAYFIELD, J.—(dissenting.) The importance of the two questions herein treated, involving, as they do, the right to a fair and impartial trial, which has been well said to be the palladium of our liberties, and which alone can preserve and perpetuate our republican form of government, constrains me to state the reasons which impel me to dissent from the opinion and conclusions of my Brothers. However, I feel that I should preface this opinion by saying that the probability is that my Brothers are right and I am wrong. The desire of each to reach the correct conclusion is no less earnest than mine, while my capacity and experience to pass upon these questions cannot be said to measure up to theirs. We have all examined and studied the same record and authorities, and thereby are led to our respective conclusions; and, notwithstanding my desire to agree with and follow my Brothers, I am firmly of the conviction that, as to these two fundamental questions, the majority opinion is radically wrong.

I concur in the opinion of the majority that this case should be reversed; but I am of the opinion that the reversal is placed upon the wrong ground. The majority opinion, in effect, overrules two, if not more, of the former decisions of this court. It is true the opinion at-

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tempts to distinguish this case from the other decisions by saying that the exact question raised in this case, upon which solely this decision is based, to wit, the right to challenge the 24 regular jurors for cause, was not raised in the other cases, and was not, therefore, passed upon by the court in those cases. It is true that the exact question was not discussed in the cases referred to, but it is not certain they were not raised on those appeals. In fact, the writer is of the opinion that the exact question was necessarily raised on those appeals. Those cases decided (as the majority opinion in this case decides) that when a venire is properly drawn for the first week of the court, and the case is then continued, or passed for trial, till a day of the succeeding week, the venire thus drawn constitutes a proper, legal, and valid venire for the trial on the day to which the case is continued or passed, and that it is not error, but proper and legal, for the trial court to direct the persons constituting the venire to appear in court on that day, and that, when they so appear, the venire is still proper and legal and should not be quashed on motion. If the opinion of the majority is correct, at least 24 of that venire are incompetent jurors for the trial of the particular case, and were rendered so incompetent by the very act of the court in continuing or passing the case to the succeeding week, and in declaring them to constitute the venire, and directing them to appear as special jurors on a particular day of the succeeding week, for the trial of such case.

Can the trial court thus deliberately and knowingly deprive the state or the defendant of 24 veniremen without affecting the validity of the venire? Is it possible to make a valid and proper venire if the very act of making it renders 24 of the number incompetent? It is true that a venire may be valid, though not a single person thereon be a competent juror. In such case, one act or

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law makes the venire, and another act or law renders its constituents incompetent; yet, if they are competent but for the act of drawing or appointing, it must of necessity render the venire invalid. If the state and the defendant are entitled of a right to a venire of 50 particular persons named, from which the jury is to be selected, the court cannot legally deprive either of a single man, much less of half the venire. The *Thomas Case* and the *Gerald Case*, referred to in the majority opinion, should be expressly overruled if this one is to stand. If all can stand, the law is a delusion and a snare, in which the state or the defendant in any capital case can be caught provided the trial cannot be had on the day or during the week for which it was originally set, but is continued or passed to a succeeding week. The principle can work against the accused as well as for him. The venire which is legally drawn and selected may be the one from which he desires to select the jury. "The court puts them upon him, and he cannot object," says the law; yet when he comes to select his 12 jurors from that 50 the law says: "You must select the 12 from 25, instead of from 50. The other 25 were competent when I put them upon you and told you to select from the 50; but the court had the right to deprive you of 25 by passing your case to the next week and ordering them back. The venire is all that the law guarantees you. It does not guarantee you 50 men from which to select." Such is the effect of the majority opinion. It ought to be avoided. If the accused can challenge those 24 jurors for cause, the state can, too; and this, notwithstanding the accused was assured he could select 12 of the entire number.

The majority opinion bases its conclusion as to the incompetency of the 24 regular jurors, and the right to challenge them, solely upon section 7247 of the Code, which renders persons incompetent to serve on a petit

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jury more than one week during any one year. The opinion is in error, for the reason that this same section expressly provides that it shall not apply "to such persons as are specially summoned to serve as jurors in capital cases." I ask: Were not these 24 regular jurors as much summoned to serve as jurors in a capital case, the second week, as were the special jurors who were summoned for the first week? The court summoned both the regular and the special jurors for the second week. The sheriff summoned neither for the second week. The court, alone summoned all. Would it have added anything to the competency of those 24 regular jurors, summoned back by the judge for the trial of this capital case, if the court had directed the clerk to issue a summons to them and instructed the sheriff to appropriately execute same by serving each juror with a copy thereof? If this had been done, they would, by the letter of the statute, have been competent. I ask: Did not the act of the court in directing them to appear the next week for the trial of this case "specially summon them to serve as jurors in a capital case?" The patent error into which the court has fallen proceeds from the construction placed upon section 7247, limiting the exception to the "special jurors in capital cases," whereas the exception extends to "all persons specially summoned to serve as jurors in capital cases." The order of the court, made publicly in open court, in the presence of all parties and of the jurors, is a special summons. The regular as well as the special jurors attend the trial by virtue of this summons, and not by that of the one the sheriff served upon them originally. The original summons only required them to attend for the former week—probably for the trial of civil causes.. For the trial of this capital case they attend by virtue of the special summons, ordered, issued, and served by the court.

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I am of the opinion that this case ought to be reversed for the failure of the trial court to award a change of venue. I am satisfied, from an examination of the record in this case, that the defendant did not, and cannot, have a fair and an impartial jury to try his case in Covington county until there is a reversal of public sentiment in that county. I do not mean to intimate that the trial court, or other officials, or the jurors, of that county consciously or intentionally denied to the accused a fair and impartial trial; for I feel sure, from an examination of this record, that they did not. On the contrary, all the actions of the trial court in the matter have been reviewed by this court, and in the light of this review I can find no error prejudicial to the defendant, save that involved in the denial of his application for a change of venue. The charges of the court and the rulings upon the evidence were exceedingly fair to the defendant. If there were any errors therein they were in his favor. The jurors, no doubt, were unconscious of any bias or prejudice against the accused, and as a matter of fact may have had none. It is not the fact that 12 fair and impartial jurors cannot be obtained in a given county, alone, that gives the defendant the right to a change of venue. Prejudice or bias often exists without consciousness thereof on the part of those who entertain it. Everybody knows (and what everybody knows courts know) that when excitement in a community is so great that as against a given person the public mind will tolerate even mob violence, which is incompatible with law and good government, it is difficult, if not impossible, to keep prejudice or bias out of the jury that is to try such person on the charge which aroused the excitement and inspired the thought of violence. In such a state of feeling and excitement, we know that witnesses sometimes hesitate to tell the truth,

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the whole truth, and nothing but the truth, if it happens to run counter to this almost irresistible tide of public opinion. Jurors might fail to see the right because of this tide of public opinion, although wholly unconscious of its existence and of its effect on themselves.

That public opinion in Covington county, at the time of this trial, was very much against the accused, no one who reads the record can doubt. Most of the facts which show this are undenied. The conclusion only is denied and disputed. The showing made by the accused purported to contain the statement of facts, which, if true (and it is in greater part undenied), renders it highly improbable that the accused could obtain a fair and impartial trial. The affidavits offered by the state, in rebuttal of these facts, at most and in the main, are the mere gratuitous opinions or conclusions of the affiants that the accused could obtain a fair trial. These affiants were no doubt honest in their statements, but they were also without doubt under the powerful duress of public opinion; and one of the very worst evils flowing from this public opinion and feeling was the determination that the accused should be tried in Covington county. We know that public opinion is insidious, as well as powerful, and that the very best and the very worst of men, alike, unconsciously fall victims to its influence. It is by this record here made to appear that the accused was a young man comparatively unknown in that county; that, relatively speaking, he was "a stranger in a strange land," and had no relatives, except a widowed mother and sister; that the man he killed was an old man and well-known citizen of the county, one "to the manor born," having a large, prominent, and influential connection, by blood and by marriage, scattered throughout the county; that the state's evidence on the preliminary trial was published in full in two coun-

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ty papers, without any part of the defendant's evidence, or one word in justification or mitigation of his offense; that great crowds, from all parts of the county, attended the preliminary trial; that mutterings and threats of lynching, on the part of friends of the deceased, were indulged in and frequently repeated; that the public feeling was bitter against the accused, that the killing was much discussed, and that there was a deep-seated prejudice against him throughout the county; that most of the discussion relative to the killing was in a spirit of animosity and unfairness toward accused; that one witness testified that he had heard the matter discussed a thousand times, and never heard a friendly word toward accused; that the sentiment against him was as bitter as could be; that public feeling on this matter, and at this trial, became a political issue in the county; that a man was jeered and derided by a large part of the public if he even showed or expressed a friendly feeling toward the accused. These conditions are not denied to have existed. Given their truth, I do not see how it is possible for the accused to have a fair and an impartial trial in that county, however honest or conscientious the jurors may be. Change of venue does not impugn the motives, integrity, or honor of the jurors or the citizens of a county. It is based simply upon that inflamed condition of public opinion, whether righteously or unrighteously aroused, that renders a fair and impartial trial improbable. For these reasons I am firmly convinced that a change of venue should be granted.—*Seams' Case*, 84 Ala. 410, 4 South. 521; *Posey's Case*, 73 Ala. 490; *Birdsong's Case*, 47 Ala. 68.

The showing made for the state cannot be said in the main to deny or dispute the facts made by the showings of the accused for a change of venue, or to show a different state or condition of public feeling; but, on the con-

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trary, they may in a sense be said to corroborate the showings of the accused. If public sentiment was in such condition as to allow the accused to have a fair and an impartial trial—if the case had not been already tried in the forum of public opinion, in advance of the trial in the courthouse, as the showings of the accused make it appear—it is exceedingly doubtful if 300 affidavits, either for or against a change, could have been procured in that county. That number of citizens, probably, would not have known or cared anything about the matter. The very fact that it is shown that everybody had discussed the case frequently, knew of it, and had tried it on the streets, on the hustings, and in the private homes, renders it improbable that the accused was not required, in that trial to reverse the verdict of public sentiment, and to enter upon his trial with the presumption of guilt attending him, instead of that of innocence which the law guarantees him from the beginning to the end of his trial. For these reasons I am firmly of the conviction that the change of venue should have been granted.

It follows that, if the accused was not entitled to a change of venue in this case, I cannot conceive a case in which he would ever be entitled to it. The showing he made in this case at the time it was first set (which was the proper time for him to make it, for it to be availing at a subsequent time) was all that could be required to authorize the change. It is difficult to note anything that was lacking. The same showing was re-offered and made at the time of the trial, and it was not shown that the duress of public opinion had abated. On the contrary, as appears, it still existed, and clamored for a trial and conviction in that county. If it can be said that the showings on the part of the state rebutted the *prima facie* case he had made for the change of ven-

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ue, then I answer: The state can, in all cases in which public opinion is so wrought up as to authorize the change of venue, make the same and as strong a showing to rebut the prima facie showing for the accused. If the state cannot make the showing in any case that it made in this, it tends rather to show that change of venue should not be granted than that it should; that is to say, nothing but quiescence in public sentiment, or the fact that the duress of public opinion is in favor of accused, and not against him, can prevent the state from always making the same showing in any case which it made in this.

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Murder.

(Decided April 8, 1909. 49 South, 224.)

1. *Homicide; Death of Decedent; Cause.*—Where the evidence clearly disclosed that death was the result of the wound inflicted and that blood poison developed, the defendant could not justify by proving that the wound was trifling and that the decedent was so diseased as to readily become infected with blood poison.

2. *Same; Dying Declarations; Admissibility.*—Whether offered by the state or by the accused, declarations made by the decedent as to the difficulty resulting in the fatal wound are inadmissible without a proper predicate.

3. *Same; Evidence; Harmless Error.*—It was not prejudicial to defendant to admit evidence of threats by decedent against the accused, and the communication thereof to accused together with the fact that on being informed of the threat the accused said that if decedent was going to kill him he was going home.

4. *Evidence; Opinion Evidence.*—The relative attitude of decedent and the instrument or person inflicting the fatal wound being an inference of fact capable of being drawn by the jury, a witness cannot give his expert opinion in reference thereto.

5. *Appeal and Error; Harmless Error; Exclusion of Evidence.*—The erroneous exclusion of evidence is cured by the subsequent admission of such evidence.

[Dumas v. The State.]

APPEAL from Wilcox Circuit Court.

Heard before Hon. B. M. MILLER.

Tingy Dumas was convicted of murder in the second degree and appeals. Affirmed.

MILLER & MILLER, for appellant. Counsel insist that if poisoning afterwards set in, where the wound was trifling at first, that it is material to know if the deceased had any other and what diseases at the time, so as to show the causal connection between the act and the death.—1 Mayf. 659; *Daughdrill v. The State*, 113 Ala. 7. Counsel discuss other assignments relative to the admissions of evidence, but without further citation of authority.

ALEXANDER M. GARBER, Attorney-General, and THOMAS W. MARTIN, Assistant Attorney-General, for the State. There was testimony showing that the gun shot wounds were the prime cause of the death, and therefore, the testimony sought to be introduced as to diseases was wholly immaterial.—*Daughdrill v. The State*, 113 Ala. 7; *Armstrong v. Montgomery St. Ry.*, 123 Ala. 233; *Fitts v. The State*, 140 Ala. 70; *Thomas v. The State*, 139 Ala. 3. No predicate for dying declarations was introduced, nor was the statement shown to be of the res gestæ.—*Wilson v. The State*, 140 Ala. 43.

McCLELLAN, J.—The defendant was convicted of murder in the second degree for the killing of John Goode. All the errors asserted relate to rulings on the admission and rejection of evidence. The deceased was shot in the side and arm; the weapon used being a pistol. He lived about three weeks after being shot. The physician attending deceased testified that the prime cause of his death was these wounds, and that blood poison developed. The defendant sought to show the

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diseased condition of deceased. There was no prejudicial error in the disallowance of that testimony. What ever may have been the physical condition of deceased at the time the wounds were received could not have benefited the defendant. Even though the wounds "were at first, trifling," defendant could not justify or minimize his criminal act by the fact, if so, that the person of the victim was so diseased as to more readily become infected with blood poison. The causal connection between the wound and the death of deceased was clearly shown; and that the disease with which Goode suffered contributed, if so, to the extreme result, did not interrupt the order of causation.

No injury resulted to defendant from the exclusion of certain declarations said to have been made by alleged co-conspirators with the deceased in their assault on defendant. This testimony was later admitted, and error, if any, cured.

The inquiry of Dr. Semmes as to what the deceased said, during his last sickness, about the difficulty, was not preceded by the requisite predicate to admit dying declarations. We know of no reason why the rule in this respect should be different when the statement of one deceased is attempted to be offered by the defendant or otherwise. The question indicated was properly disallowed on appropriate objection.

The question purporting to call for expert opinion as to the relative attitude of the deceased and the instrument or person inflicting the wound was correctly ruled out.—*McKee's Case* 82 Ala. 32, 38, 2 South. 451. It related to an inference of fact, as capable of being drawn by the jury as by any other.

Dan Watson testified to threats by the deceased against defendant, and that he communicated them to defendant. The state then asked the witness what defendant

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said when so informed by witness. The defendant objected, and the court overruled it. The answer was that defendant said: "If he is going to kill me, I will go home." We cannot see any prejudice resulting to defendant from this ruling.

There is no harmful error to defendant in the record, and the judgment is affirmed.

Affirmed.

DOWDELL, C. J., and ANDERSON and SAYRE, JJ., concur.

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Murder.

(Decided Feb. 9, 1900. 48 South. 796.)

1. *Homicide; Instructions.*—It was error to refuse an instruction requiring the acquittal of defendant unless deceased died from the effects of a wound inflicted by defendant with a knife, since the indictment charged the killing by cutting with a knife, and the evidence showed that there were pistol wounds on deceased's body and incisive wounds which may have been inflicted by a knife, or by a barbed wire fence with which deceased came in contact.

2. *Same; Indictment; Evidence; Variance.*—Where the indictment charged that the defendant killed deceased by cutting him with a knife the defendant cannot be convicted upon proof that he shot deceased with a pistol or threw him against a wire fence, cutting him.

3. *Same; Cause of Death.*—It is not necessary that the blows given deceased by defendant, or the defendant's wrongful act, should be the sole cause of decedent's death, in order to render the defendant guilty of homicide; for if the blow or blows or the defendant's wrongful act, contributed to the death, or hastened it, the defendant would be responsible according to the circumstances of the particular case.

APPEAL from Dallas Circuit Court.

Heard before Hon. S. L. BREWER.

Sam Huckabee was convicted of murder and he appeals. Reversed and remanded.

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ARTHUR M. PITTS, for appellant. The defendant should have been allowed to have shown that Emerson had been convicted.—*Wells v. The State*, 31 South. 572; *Traylor v. The State*, 100 Ala. 142. The court erred in refusing charge 2 requested by the plaintiff.—*Phillips v. The State*, 68 Ala. 471. Counsel discusses other assignments of error, but without citation of authority.

ALEXANDER M. GARBER, Attorney-General, for the State. The court did not err in reference to the admission and exclusion of evidence.—*Walker v. The State*, 58 Ala. 359. The remarks of counsel were properly excluded from the jury.—*Barnes v. The State*, 111 Ala. 6. Charge 2 was properly refused.—*Boullemet v. The State*, 38 Ala. 83. Charge 11 was properly refused.—*Turner v. The State*, 97 Ala. 57. So was charge 12.—*Daughdrill v. The State*, 113 Ala. 7.

MAYFIELD, J.—The indictment in this case was as follows: "The State of Alabama, Dallas County. Circuit Court, Fall Term 1908. The grand jury of said county charges that, before the finding of this indictment, Sam Huckabee unlawfully and with malice aforethought killed Arthur Coleman by cutting him with a knife, against the peace and dignity of the state of Alabama. [Signed] J. F. Thompson, Solicitor for 4th Circuit.

The evidence was in conflict as to whether the deceased was cut with a knife or by a barbed wire. He had several wounds inflicted upon him during the altercation with the defendant. One was a pistol shot wound on his right leg; and he had an incised wound on the back of his neck, and a slight contusion on his right cheek, which closed his eye, and was bloody and spitting blood after the fight and before his death. It was

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shown that a running fight had occurred between defendant and deceased, which lasted several minutes; each retreating at time and pursuing the other at times. The deceased had a pistol, and defendant a knife. Deceased shot at defendant several time during the fight. The defendant finally closed in on deceased, grappled with him, and wrested the pistol from him. The pistol was fired one or more times during this struggle, and deceased fell or was thrown by defendant against a wire fence—some witnesses saying it was of barbed wire; others, that it was not.

The deceased was shown to be a bleeder; that is, a person that bleeds freely from a slight wound, or upon whom such a wound produces hemorrhages difficult to check. It was shown that deceased bled much and for a long time from these wounds, and for a long while freely spat up blood. One of the surgeons examined by the state testified that he could not say that the wound on deceased's neck caused his death; that deceased died about two weeks after he examined him; that, deceased being a bleeder, his blood would not coagulate as it would naturally, and that to such a person any wound, no matter how slight, is dangerous; that a slight operation on such a person often causes death; that the wound on deceased's neck, which was alleged to be a knife wound, was doing well while he attended him; that the wound on his cheek was not a knife wound, but that it became swollen and gave him much trouble; that deceased died from loss of blood, and probably from erysipelous inflammation. The other surgeon examined by the state testified that he saw deceased the night of the injury, in March; that deceased had a wound on the back of his neck, about three inches long and one-fourth of an inch deep, clean cut; that deceased was a bleeder.

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that all wounds on a bleeder are considered dangerous; that such a wound as described would accelerate death; that he saw deceased no more after that night.

The defendant requested the court to give the following charge, which was in writing: "The court charges the jury that unless you are convinced beyond a reasonable doubt, from the evidence in this case, that the deceased, Arthur Coleman, died from the effects of a wound inflicted by a knife upon him by defendant, you must acquit the defendant." The court refused this charge, and in this we think there was error. The charge was a proper one, when applied to the facts in this case. There are cases in which it might be refused, because abstract, or were the cause of the death or the deodands are not disputed, or are admitted; but here the cause of the death and the deodands were disputed questions. The indictment charged singly and specifically that defendant killed deceased by cutting him with a knife. He could not be convicted under that indictment, if he killed deceased by any other means, and could not be convicted unless he inflicted the wound which caused, contributed to, or accelerated his death, and he must have inflicted that wound with a knife; and the jury must believe these facts beyond a reasonable doubt before the defendant could be properly convicted under said indictment.

The means by which an offense is committed, if unknown, and they do not enter into the essence of the offense, may be alleged to be unknown (Code 1907, § 7144); and if an offense may be committed by different means or intent, such means or intent may be alleged in the same count in the alternative (Code, § 7149). If an indictment alleges the means by which an offense is committed, it must be substantially, though not literally, proven as alleged. If it alleges that the defendant

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killed the deceased with a knife, it is sufficient if the substance of the allegation be proven; i. e., proof that he killed him with a razor, or an instrument of like kind and character, would be sufficient. Or, if the allegation be that he killed him with a gun, proof that he killed him with a pistol would support it. But the allegation that he killed him by cutting him with a knife would not be supported by proof that he shot him with a pistol or threw him against a barbed wire fence.—*Phillip's Case*, 68 Ala. 471; *Hull v. State*, 79 Ala. 32; *Jones v. State*, 137 Ala. 12, 34 South. 681; *Walker v. State*, 73 Ala. 17.

It will appear from an examination of the authorities that a charge like the one in question should be given in some cases, and refused in others. The case at bar is one particular circumstanced to render the charge not only proper, but to render its refusal reversible error. Not attempting here to pass upon the weight of the evidence, it is, however, proper to say there was evidence to show that deceased came to his death independently of any wounds inflicted by a knife or instrument of like kind or character, and the defendant had the right to have the jury instructed upon this theory of the law; and this charge was a correct and fair exposition of the law as to this feature of the evidence. There was no evidence to show that any wound was inflicted with an instrument similar in kind or character to a knife. They were caused by a pistol, a knife itself, a wire fence, or some blunt instrument.

To render a defendant guilty of homicide, it is not necessary that the blow given by him, or that the agency or means used by him, or that his wrongful act, should be the sole or necessary cause of the death complained of. If his wrongful act, agency, means, blow, or the like, accelerates or contributes to the death, he may be respon-

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sible, according to the circumstances of the particular case. It is said: "It is not permitted to the offender to apportion his wrong" in such cases. "Ordinarily, if a wound is inflicted, not dangerous in itself, and death was evidently occasioned by grossly erroneous treatment, the original author will not be accountable; but, if the wound be mortal or dangerous, the person who inflicted it cannot shelter himself under the plea of erroneous treatment."—*Parsons' Case*, 21 Ala. 301; *McAllister's Case*, 17 Ala. 434, 52 Am. Dec. 180; *Bowles' Case*, 58 Ala. 335; *Daughdrill's Case*, 113 Ala. 34, 21 South. 378; *Winter's Case*, 123 Ala. 1, 26 South. 949; *Russell on Crimes* (Int. Ed.) pp. 35, 36; *Hale's P. C.* 428; 1 East, C. L. 344, § 113.

The facts in this case are peculiar, in that the deceased was a bleeder. A slight wound upon such is shown to be dangerous, and frequently mortal; whereas, a similar injury inflicted upon a normal person would not be dangerous or even serious. Applying these rules of law to the particular case, we find no error as to other charges refused or given, nor as to rulings upon the evidence relating to the severity of the wounds, or to the mode of treatment thereof, when applied to the killing of a person whose natural physiology is abnormal. We have treated this phase of the case, because it will of necessity arise upon another trial. The other questions may not arise on another trial, and what we have said will probably be a sufficient guide.

For the error in refusing the charge above treated, the judgment must be reversed, and the cause remanded.

Reversed and remanded.

DOWDELL, C. J., and ANDERSON and McCLELLAN, JJ., concur.

[Tannehill v. The State.]

Tannehill v. The State.***Murder.***

(Decided Feb. 2, 1909. 48 South. 662.)

Criminal Law; Trial; Argument of Counsel.—It is error to permit remark of counsel stating facts that are not in evidence before the jury to be allowed.

APPEAL from Shelby Circuit Court.

Heard before Hon. A. H. ALSTON.

Sam Tannehill was convicted of murder in the second degree, and he appeals. Reversed and remanded.

F. S. FERGUSON, for appellant. The remarks of the solicitor were wholly unsupported by the evidence and the refusal of the court to withdraw them from the jury was error to the great injury to the appellant.—*Scott v. State*, 110 Ala. 48; *Drennen v. State*, 185 Ala. 69; *Bham Nat. Bank v. Bradley*, 116 Ala. 142; *Cunningham v. State*, 117 Ala. 59; *Brock v. State*, 123 Ala. 24; *Coffin v. State*, 123 Ala. 58; *Fitzpatrick v. Bank*, 127 Ala. 589; *Ragland v. State*, 125 Ala. 12; *Johnson v. State*, 134 Ala. 54; *White v. State*, 136 Ala. 58; *Davis v. Alexander City*, 137 Ala. 266; *Hundley v. Chadick*, 109 Ala. 575; *Florance Co. v. Field*, 104 Ala. 471; *Bates v. Morris*, 101 Ala. 282; *Dollar v. State*, 99 Ala. 236; *Haynes v. McRea*, 101 Ala. 319; *Pollock v. Hames*, 94 Ala. 421; *Wolffe v. Minnis*, 74 Ala. 389; *Cross v. State*, 68 Ala. 467; *Sullivan v. State*, 66 Ala. 48; *Railand v. Bayless*, 75 Ala. 466.

ALEXANDER M. GARRER, Attorney-General, and BORDEN H. BURR, Solicitor, for the State. The court did not err in not excluding the remarks of the solicitor from

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the jury.—*Cross v. The State*, 68 Ala. 484; *Lide v. The State*, 133 Ala. 43; *Jacksson v. The State*, 136 Ala. 22; *Dennis v. The State*, 139 Ala. 109; *Pul v. The State*, 144 Ala. 125.

SIMPSON, J.—The appellant was convicted of the crime of murder in the second degree, and sentenced to 30 years in the penitentiary.

The defendant, who is a colored man, sought to prove an alibi, and, to prove the same, examined one white man and three colored men. The solicitor, in closing his argument to the jury, said: "The only defense to these confessions of the defendant, with the corroborating facts shown by Mr. McBride and Mr. Martin, is the alibi set up by a lot of negro witnesses. Why, gentlemen, if you acquit this man on such an alibi as this, you can never expect to convict another negro of crime in this country. You know the negro race—how they stick up to each other when accused of crime, and that they will always get up an alibi, prove it by perjured testimony of their own color, and get their accused companion clear if they can." Counsel for defendant excepted to these remarks, and moved the court to exclude same from the jury.

It is the duty of the court to see that the defendant is tried according to the law and the evidence, free from any appeal to prejudice or other improper motive, and this duty is emphasized when a colored man is placed upon trial before a jury of white men. Courts in some other jurisdictions have held, on what seems to be good reason, that the injury done by such remarks cannot even be atoned by the retraction or the ruling out of the remarks; but at least it is error, as held by our own courts, for such remarks, stating facts that are not in evidence before the jury, to be allowed.—*Florence Cot*

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ton & Iron Co. v. Field, 104 Ala. 472, 480, 16 South 538; *Anderson v. State*, 104 Ala. 84, 87, 16 South. 108; *Dollar v. State*, 99 Ala. 236, 237, 13 South. 575; *Wolffe v. Minnis*, 74 Ala. 386, 389; *E. T. V. & Co. R. v. Bayliss*, 75 Ala. 466, 470; *Sullivan v. State*, 66 Ala. 48, 50, 51; *Quinn v. People*, 123 Ill. 333, 15 N. E. 46.

The judgment of the court is reversed, and the cause remanded.

Reversed and remanded.

TYSON, C. J., and DENSON and MAYFIELD, JJ., concur.

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Murder.

(Decided Feb. 18, 1909. 48 South. 689.)

1. *Evidence; Acts and Declarations of Defendant.*—The conduct, demeanor and expression of a defendant at or about the time of the homicide are admissible in evidence against him, but unless part of the *res gestae* are not admissible for him; if, however, the state introduces his confessions, declarations or admissions, then the defendant may give in evidence all that he said in connection therewith and the circumstances attending it, but cannot make this the basis of showing what he did or said on other occasions.

2. *Homicide; Evidence; Acts of Defendant.*—It was proper to show in a prosecution for homicide that after the affray the defendant went home and got a gun, and within fifteen or twenty minutes came back, and that when he returned he told certain persons to turn deceased loose or get out of the way as he was going to shoot him; and the state having shown this, the defendant should have been permitted to prove that just before leaving home he stated that he was going after one F. and have him make deceased stop his fuss, as part of the *res gestae* of that matter, though not a part of the *res gestae* of the killing.

APPEAL from Tuscaloosa County Court.

Heard before Hon. H. B. FOSTER.

Collins Maddox was convicted of murder in the second degree, and appeals. Reversed and remanded.

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The witness Lucinda Murray, being on the stand, was asked the following questions and made the following answers, to which objections were made and overruled, and to which exceptions were reserved: "(1) State whether Collins Maddox, after the cutting, went home, and got a gun, and came back up there. A. He went home, and got a gun, and came back there, where she and others were with Jesse Davis [the man who was alleged to have been killed by a cut from a knife]. Collins Maddox was gone 15 or 20 minutes before he came back. (2) State what Collins Maddox said when he came back. A. Turn him loose, and I will finish the damn——." The defendant then asked the witness: "Did not the defendant say, at his house, as he was going out to get his mule, just after the fuss came up down there, that he was going down to Mr. Joe Foster's and get him to have the fuss stopped, or make him stop cutting up?" Objection was sustained to this question. The state then introduced Fred Bailey, and the solicitor asked the witness to state whether, after the cutting, Collins Maddox went off and came back again, and the witness answered that he did go off and come back again. Objection was interposed and overruled to the question and answer. Further questions: "State what defendant had when he came back, if anything. A. He had a shotgun. Q. State what the defendant said when he came back, if anything. A. Get out of the way and let me shoot him. I'm going to finish him." The defendant then asked the witness the following question, to which objection was sustained: "Did not the defendant, at his home, just before you left, say that he was going after Mr. Joe Foster, and have him make Jesse Davis stop that fussing down there?" The defendant then introduced Maddox, and offered to ask him the same question as to what the defendant said about getting Mr. Fostser to stop the fuss,

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to which objection was sustained, and this question, "State whether the defendant, at the time he went to the lot, stated for what purpose he was going, and whether he stated where he would go," to which objection was sustained, and this question, "State whether or not the defendant stated, at the time he started for the lot, where he was going," to which objection was sustained. On cross-examination the solicitor asked this witness the following question: "State what you were doing when Collins came back down there where the cutting occurred. A. That he was holding Jesse Davis up." Objection was interposed and overruled to both question and answer, as they were to the following question and answer to the same witness: "While you were holding Jesse Davis up, to keep his entrals out of the sand, did not Collins Maddox tell you to get out of the way, that he was going to finish Jesse Davis?" and the answer. "Turn him loose, I am going to shoot him." While the defendant was on the stand, he testified that he had ordered Davis to go away from the house and Davis replied: Dam you and your yard, too; I'm not going anywhere.'

DANIEL COLLIER, for appellant. The state having brought out a part of a transaction and what was said, the defendant was entitled to his version of it, and the court erred in excluding the testimony as to the complete transaction.—*Burns v. The State*, 49 Ala. 374; 39 Ala. 532; 26 Ala. 63; *Williams v. The State*, 103 Ala. 33; *State v. Drake*, 113 Ala. 9; *Davis v. The tSate*, 92 Ala. 20; *Williams v. The State*, 130 Ala. 116; *Fonville v. The State*, 91 Ala. 39.

ALEXANDER M. GARBER, Attorney-General, for the State. Error is not shown in the action of the court in

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excluding evidence.—*McManus v. The State*, 36 Ala 292; *Harkness v. The State*, 129 Ala. 78; *Jones v. The State*, 116 Ala. 468.

MAYFIELD, J.—It has been uniformly held in this state, in homicide cases, that the conduct, demeanor, and expressions of the accused, at or about the time of the homicide, are matters admissible in evidence against, but not for him, unless part of the *res gestæ*.—*McManus' Case*, 36 Ala. 292; *Blount's Case*, 49 Ala. 381; *Miller's Case*, 107 Ala. 40, 19 South. 37; *Johnson's Case*, 17 Ala. 623; *Henry's Case*, 79 Ala. 42; *Armor v. State*, 63 Ala. 173; *Levison v. State*, 54 Ala. 520; *Reeves v. State*, 96 Ala. 33, 11 South. 296; *Pate v. State*, 94 Ala. 14, 10 South. 665; *Campbell v. State*, 23 Ala. 44. This court has probably gone as far as any other in holding such evidence admissible against the accused and inadmissible for him. In the case of *Hainesworth v. State*, 136 Ala. 13, 34 South. 203, it was held that evidence as to the facial expression of the accused, how he looked or appeared, at a prayer meeting several hours before the homicide, which was committed at the house of the deceased some distance from the place of the prayer meeting, was admissible against him. In *Campbell's Case*, 23 Ala. 79, it was held that the state could prove the appearance of the accused on the evening of the day of the homicide, and on the following day, but that the accused could not prove his appearance or expressions three days subsequent to the killing. The reason given in this case, and in other authorities, for the rule, is that evidence of the conduct, demeanor, acts, expressions, or appearance of the accused, shortly before, at the time of, or shortly after, the homicide, is admissible against him, because his conduct, appearance, and expressions, on these occasions, are presumed to corres-

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pond with the truth, but that they operate in the nature of admissions, and therefore they are often admissible as such, but that the defendant can no more make his conduct or appearance evidence for him, than he could his declarations of innocence, as this would permit him to manufacture his own evidence, which, of course, is not, and should not be, allowable.

The writer of this opinion thinks that this court and some trial courts have gone too far, in certain of the cases reported, in admitting such evidence against the accused; but the case at bar is not one of the class. The evidence admitted for the state over the objections of the defendant, and that excluded by the court, which was offered by the defendant for the purpose of showing his conduct prior to the time of and after the homicide, was in each instance properly admitted or excluded, except as hereafter appears.

It is insisted with some force by the learned counsel for the defendant that the evidence offered by the defendant as to these questions was admissible, and improperly excluded, because the state had first given in evidence of these matters, and the defendant then had the right to lay before the jury all he said and did at the time and on the occasions referred to by the state's evidence on the theory that, where a part of a conversation or transaction is admitted at the offer of one party, the whole or other parts thereof are admissible, if offered by the other. The cases cited by counsel for defendant lay down the correct rule, which is: The accused cannot give in evidence his own declarations, unless they form a part of the *res gestæ*; but if the state gives in evidence his confessions, declarations, or admissions, then he may give in evidence all that he said in the particular confession, declaration, or admission, and the circumstances attending it, but he cannot make this the basis of show-

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ing what he said or did on other occasions. None of the evidence offered by the defendant and excluded by the court, except as hereafter referred to, was admissible under this rule. What was said by Justice Brickell, in the case of *Burns v. State*, 49 Ala. 374, which case is cited by counsel for appellant, is pertinent and applicable to show there was no error in excluding the evidence offered by the accused, which we quote: "The prisoner offered to prove exculpatory declarations made by him when he returned to the stillhouse after the shooting, which the court excluded. The bill of exceptions does not inform us whether these declarations formed a part of the conversation of which the state gave evidence, or whether they were made in another and subsequent conversation. Of course, we cannot say that the court erred in rejecting them."

However, the declarations of the accused, made at or about the time he left home, as to the object and purpose of his leaving, stand upon another footing. They are a part of the *res gestæ* of this matter, though not a part of the *res gestæ* of the killing.—*Kilgore v. Stanley*, 90 Ala. 523, 8 South. 130; *Pitts v. Burroughs*, 6 Ala. 733; *Olds v. Powell*, 7 Ala. 652, 42 Am. Dec. 605; *Harris v. State*, 96 Ala. 24, 11 South. 255; *Burton v. State*, 115 Ala. 10, 22 South. 585; *Campbell v. State*, 133 Ala. 81, 31 South. 802, 91 Am. St. Rep. 17. The object and purpose of his leaving home at this time was properly made a subject of inquiry on the trial. His guilt or innocence, or, at least, the degree of the crime, might properly depend upon the question whether he pursued deceased for the purpose of killing him, or whether he left home, not for that purpose, but for the purpose (as he claimed) of going to Mr. Foster's to get the latter to come to his house to quell the disturbance.

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It follows, therefore, that the trial court erred in refusing to allow proof of the declarations of the accused, made at or about the time of his leaving home, to the effect that he was going over to get Mr. Foster to come there and stop the row or disturbance. For this error, the judgment of conviction must be reversed, and the cause remanded.

Reversed and remanded.

DOWDELL, C. J., and SIMPSON and DENSON, JJ., concur.

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Assault and Battery.

(Decided Feb. 4, 1909. 48 South. 805.)

1. *Courts; Time for Opening.*—The Act of 1890-1, p. 68, amending section 750, Code 1886, only repeals said section so far as it applies to the counties mentioned therein, and does not have the effect to revise and extend the section so as to make it apply to counties previously removed from its influence, and does not have the effect of repealing Acts 1888-9, p. 64, authorizing the opening of the courts in the 3rd and 5th circuit at 10 A. M.

2. *Statutes; Amendment in Passage; Changing Original Purpose.*—Where the change in the statute pending its passage, was from the word, opening, to the word, holding, in regulating and fixing the time for opening or holding court, such change did not render Acts 1888-9, p. 64, violative of section 19, article 4, Constitution 1875; the terms as used, being synonymous.

3. *Indictment and Information; Return; Presence of Grand Jurors*—Section 4914, Code 1896 is sufficiently complied with when the record recites that the indictment was returned into open court by the foreman in the presence of all the other grand jurors, and it was shown that there were more than eleven other grand jurors present.

4. *Charge of Court; Reasonable Doubt.*—A charge asserting that if after considering all the evidence the jury had a reasonable doubt of the guilt of the defendant, they will give the benefit of the doubt to the defendant and return a verdict of not guilty, is a proper statement of the law; such charge is not covered by a charge given as follows: If any member of the jury have a reasonable doubt of the guilt of defendant, the jury will not return a verdict of guilty.

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5. *Trial; General Charge; Request.*—Where the prosecution was for a felony and the conviction was for a misdemeanor, and there was no evidence to show that the misdemeanor was barred by the statute of limitation, the general charge which did not separate the misdemeanor from the felony, the point not having been otherwise raised, was properly refused, where the evidence authorized a conviction of the felony.

6. *Indictment and Information; Conviction of Lesser Offense; Limitation.*—A conviction for assault and battery under an indictment charging assault with intent to murder, cannot be sustained if the assault and battery is barred by the statute of limitations, although the felony charged is not so barred.

APPEAL from Macon Circuit Court.

Heard before Hon. S. L. BREWER.

Metcalf Letcher was indicted and tried for assault with intent to murder, and convicted of an assault and battery with a weapon, from which he appeals. Reversed and remanded.

The facts on which the opinion was rested sufficiently appear therein. Charge 3, referred to in the opinion, is as follows: "After considering all the evidence in this case, if the jury have a reasonable doubt of the guilt of the defendant, they will give the benefit of the doubt to the defendant, and return a verdict of not guilty." Charge 2, given and referred to as not being a duplicate of charge 3, is as follows: "If any member of the jury have a reasonable doubt of the guilt of defendant, the jury will not return a verdict of guilty."

J. T. LETCHER, THOMAS L. BULGER, and H. P. MERRITT, for appellant. The act permitting the opening of the courts at eleven o'clock in the 3rd and 5th judicial circuits is not only unconstitutional but was repealed by the Act of General Assembly approved Dec. 9, 1890. Any judgment rendered or proceedings had at a time and place other than authorized by law, are void.—*Dunbar v. Frazer*, 78 Ala. 532; *Garlic v. Dunn*, 48 Ala. 402; *Bir. B. & L. Anns. v. The State*, 120 Ala. 408. On these authorities, the court erred in overruling defendant's

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demurrer to the replications to the pleas in abatement. The plea was a valid plea of former jeopardy.—12 Cyc. 216; *Lyman v. The State*, 47 Ala. 686; *Baysinger v. The State*, 77 Ala. 62. The court erred in permitting testimony as to the pistol wound.—*Letcher v. The State*, 39 South. 922. The court should have given charge 3.—*Hunt v. The State*, 135 Ala. 1; *Turner v. The State*, 124 Ala. 59; *Forney v. The State*, 98 Ala. 19; *Hurd v. The State*, 94 Ala. 100. Charge 6 should have been given.—*Crawford v. The State*, 112 Ala. 1. Charge 7 should have been given.—*Harris v. The State*, 96 Ala. 24; *Christian v. The State*, 96 Ala. 89; *Crawford v. The State*, *supra*. It was immaterial that the indictment was for assault with intent to murder since the trial was for an assault and battery, and the evidence showed without conflict that the offense was barred.

ALEXANDER M. GARBER, Attorney-General, and THOMAS W. MARTIN, Assistant Attorney-General, for the State. The Act of Dec. 9, 1890, is not unconstitutional and does not have the effect to repeal the Act of Feb. 27, 1889.—*State ex rel. v. Houghton*, 142 Ala. 90; *Fourment v. The State*, 46 South. 266. In any event the objection comes too late.—Sec. 5269, Code 1896. Therefore, the motion to quash the indictment was properly overruled. The other grounds of the demurrer were properly overruled. *Russell v. The State*, 33 Ala. 366; *Mose v. The State*, 35 Ala. 421. The court did not err in reference to the admission of evidence.—*Hall v. The State*, 134 Ala. 90. Charge 4 was bad.—*Mann v. The State*, 134 Ala. 1; *Matthews v. The State*, 136 Ala. 47. The court did not err in reference to its actions on the plea of former jeopardy. As to the 1st plea, counsel cite.—*Smith v. The State*, 52 Ala. 407; *Henry v. The State*, 33 Ala. 389;

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Reynolds v. The State, 92 Ala. 44; *McGehee v. The State*, 58 Ala. 360. On the 3rd plea, they cite the former report of this case in 39 South. 922.

ANDERSON, J.—The term of court at which this indictment was found was opened at 11 o'clock, and Acts 1888-89, p. 64, authorizes the opening of courts in the Fifth judicial circuit at 10 a. m. Indeed, it is conceded in brief of counsel that the court was legally opened, and the the grand jury findiing the indictmennt was legally organized, unless this act be unconstitutional, or unless it was repealed by Acts 1890 p. 68. This act only repeals the Code of 1886 in so far as it applies to the counties of Lamar, Franklin, Fayette, and Marion, and did not have the effect of revising and extending said section, so as to make it extend to counties which had been previously removed from its influence by subsequent acts. The subject as expressed in the title of the act was to amend said section 750 of the Code, so far as the same applies to the counties of Lamar, Fayette, Franklin, and Marion; in other words, to provide for the holding or opening of courts in these counties. The body of the act does attempt to re-enact the said section, as applied to the entire state, except as to these four counties; but to hold that said act regulated the opening of courts in all the counties of the state would render it much broader than its title indicates, and make it apply to a subject not clearly expressed in said title, and probably repugnant to section 45 of the Constitution of 1901.

It is also insisted that Acts 1888-89, p. 64, is violative of section 19, art. 4, of the Constitution of 1875, because it was so altered or amended as to change its original purpose; the change complained of being from a bill "to regulate and fix the time of opening courts in the Third

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and Fifth circuits" to one "to regulate and fix the time of holding courts" in said counties. We do not think that this was a change of the original purpose of the act. "Opening" and "holding" as used in this connection, are synonymous. Opening is essential to holding, and holding court includes opening the court. The indictment, having been returned by a legally organized grand jury, was valid, and the trial court committed no reversible errors in the rulings upon the motions, pleas, and charges attacking the indictment, because not returned by a legal grand jury.

This case is treated upon the assumption that the statute with reference to the hour of opening court is mandatory; and, as the statute, was complied with, it is unnecessary for us to determine whether it was mandatory or directory.

While section 4914 of the Code of 1896 requires that indictments must be presented to the court by the foreman in the presence of at least 11 other jurors, we think that the record shows a compliance with this statute. It recites that it was returned into open court by the foreman in the presence of "all the other grand jurors." The record also shows that there were more than 11 other grand jurors.—*Russell v. The State*, 33 Ala. 370.

Charge 3, requested by the defendant, asserted the law, and should have been given. Nor was it covered by given charge 2.

It is insisted that, while the offense for which the defendant was indicted was not barred by the statute of limitations, the one for which he was convicted, being a misdemeanor, was barred by section 4914 of the Code of 1896. It is true the only proof as to the commencement of the prosecution is the indictment, which was returned more than a year after the assault; but the point was raised only by the general charge, which did

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not separate the misdemeanor from the felony, and, as there was proof authorizing the jury to convict for the felony, the trial court properly refused the general charge.

As this case must be reversed, however, for other reasons, we may as well lay down the rule on this subject as a guide upon the next trial, notwithstanding it may be dictum upon this appeal. The defendant having been acquitted of the felony, the state will have to rely upon the misdemeanor, in the event the former acquittal of felony is pleaded by the defendant. Then, unless the proof shows that the prosecution was commenced within a year after the commission of the said assault, the defendant will be entitled to an acquittal. The law is well settled on the subject: "If, on an indictment for a felony, the accused is found guilty of some less crime included in the felony and which constitutes a part of it, the conviction cannot be sustained where the crime of which he is convicted is barred by the statute of limitations, although the crime for which he was indicted is not thus barred."—12 Cyc. 257. This rule is sanctioned in the cases of *Turley v. State*, 3 Heisk. (Tenn.) 11; *Fulcher v. State*, 33 Tex. Cr. R. 22, 24 S. W. 292; *Nelson v. State*, 17 Fla. 195; *State v. Morrison*, 31 La. Ann. 211; *Heward v. State*, 13 Smedes & M. (Miss.) 261; *People v. Miller*, 12 Cal. 291; *People v. Burt*, 51 Mich. 199, 16 N. W. 378. The only authority to the contrary seems to be the case of *Clark v. State*, 12 Ga. 350.

The judgment of the circuit court is reversed, and the cause is remanded.

Reversed and remanded.

TYSON, C. J., and DOWDELL, SIMPSON, DENSON, and MAYFIELD, JJ., concur.

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McCLELLAN, J.—(dissenting). The defendant was put to trial on an indictment charging an assault with intent to murder. This indictment was returned more than 12 months after the act for which the judgment of conviction now complained of by the defendant was committed. Accordingly, upon the sound holding made in the last paragraph of the opinion of the majority, the misdemeanor of which defendant was convicted was not embraced in the major charge of assault with intent to murder, unless taken out of the effect of that bar by proof that the offense charged was a continuance of a prosecution instituted against this defendant before the 12 months' bar stated operated to conclude a prosecution for the misdemeanor of which the defendant was attempted to be convicted. The bill of exceptionss purports to contain substantially all of the evidence aduced on the trial. No evidence, the effect of which was to avoid the bar stated, was offered.

In this state of the case I am of the opinion that the court was wholly without jurisdiction to render the judgment, under this indictment, for an assault with a weapon, a misdemeanor, as was here undertaken. The point has been, in my opinion, expressly decided in *McDowell v. State*, 61 Ala. 174, where it was said: "Although, however as was held in the first of these cases, the time when an offense was committed need not be alleged in the indictment, it must be proved on the trial that it was committed within the period which is prescribed as a bar against the prosecution for it. If this is not done, the prosecution fails. Why? Because, when the period of limitation elapsed, the act ceased to be a punishable offense. No court was then authorized to pronounce sentence against the person who committed it." The obvious result, in this case, was that no such offense as that of which the judgment condemns the defendant was em-

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braced in the major charge. The defendant was not charged with the misdemeanor, and the judgment assuming to so condemn him is a nullity, because the record shows that the court was without jurisdiction of the misdemeanor of which the court below attempted to adjudge the defendant guilty. Being so void for want of jurisdiction, it could not, of course, support an appeal.—2 Ency. Pl. & Pr. p. 103, and note citing our decisions. There cannot be, it seems to me, such a thing as a reversal of a judgment shown to have been rendered without jurisdiction, because a reversal presupposes an appeal, and from a void (for want of jurisdiction) judgment an appeal will not lie.

Nor is there any merit in the suggestion that the defendant, if his appeal should be dismissed on the ground that it was void, as is my opinion should be done, would be left with the judgment below against him, for the reason that, if such dismissal was entered, it would be a final adjudication of the invalidity of the judgment, and the court below would not attempt its enforcement; but, if it did undertake to enforce it, prohibition and other remedies, it may be, would be subject to defendant's employment. To reverse this case on the presumption that evidence may be introduced to avoid the bar before stated is, in my opinion, to presume jurisdiction in the face of the record before us, which denies it.

Dial v. The State.

Retailing Liquor Without License.

(Decided April 27, 1909. 49 South. 230.)

1. *Intoxicating Liquors; Illegal Sale.*—Where a number of persons contributed money to buy whiskey, and one of the number takes the money and goes off and buys whisky and brings it back, and such

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person has no interest in the whisky before the sale and no interest in the sale, such person is not guilty of retailing liquor without license.

2. *Charge of Court; Instructions Abstract.*—Where an instruction hypothesizes facts testified to by a witness in a case it may not be said to be abstract.

APPEAL from Marengo Circuit Court.

Heard before Hon. JOHN T. LACKLAND.

Gray Dial was convicted of retailing liquor without a license and appeals. Reversed and remanded.

The indictment was in code form for retailing liquor, and, while the record does not disclose in what particular portion of Marengo county the selling occurred, it shows that it was within the county. The evidence for the defendant tended to show that four persons, including the defendant, were present at a certain place, and each contributed 20 cents, with which defendant went off and within about 20 minutes returned with some whisky; that the money was given him before he went after the liquor; and that he had no interest in the whisky, but bought it for himself and the others.

The following charge was refused to the defendant:

“(2) I charge you, gentlemen of the jury, if you believe from the evidence beyond a reasonable doubt that each of the four parties furnished the money to purchase the whisky, and that the defendant bought it, and that the defendant had no interest in the sale of the liquor, then you must find the defendant not guilty.”

No counsel marked for appellant.

ALEXANDER M. GARBER, Attorney-General, for the State. Charge 1 was properly refused.—*Turner v. The State*, 97 Ala. 57; *Mitchell v. The State*, 94 Ala. 68; *Fonville v. The State*, 91 Ala. 44; *Smith v. The State*, 88 Ala. 23; *Adams v. The State*, 78 Ala. 489.

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ANDERSON, J.—There was evidence on the part of the state from which the jury could infer that defendant sold the liquor, notwithstanding his evidence showed that he was a mere purchasing agent and had no interest in the sale, and the trial court properly refused the general charge (1) requested by the defendant.

Under the facts hypothesized in charge 2, the defendant was not guilty of selling the liquor.—*Du Bois v. State*, 87 Ala. 101, 6 South. 381, and cases there cited. Nor was the charge abstract, as the defendant testified to the facts therein hypothesized. The trial court erred in refusing charge 2 requested by the defendant.

Whether or not there was a local law prohibiting and punishing the procurement of the whiskey, even if defendant did not sell it, we are unable to determine, as no such law covered the entire county of Marengo at the time of the alleged violation, and the proof does not locate the same in any particular part of the county.

The judgment of the circuit court is reversed, and the cause is remanded.

Reversed and remanded.

DOWDELL, C. J., and McCLELLAN and SAYRE, JJ., concur.

Smith v. The State.

Selling Liquor Without License.

(Decided Feb. 5, 1909. 48 South. 668.)

1. *Witnesses; Credibility.*—A witnesses' credibility may not be attacked by asking him a question, "You were arrested for selling whisky in Roanoke about June 1st, yourself, were you not?"

2. *Appeal and Error; Harmless Error.*—Where, in his subsequent testimony a witness fully answered a question formerly propounded to him, if it was error to sustain objection to the question in the first instance it was rendered harmless.

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3. *Witnesses; Credibility; Conviction of Crime.*—Construing together sections 4008 and 4009, Code 1907, the solicitor may ask a defendant's witness if he had not served a term in the penitentiary, and for what he was sent up, and on the witness answering for murder, he may be asked how long he staid there.

4. *Charge of Court; Reasonable Doubt.*—A charge asserting, "You cannot convict a man on any sort of evidence, but the law itself demands that the proof must show beyond all reasonable doubt that defendant is guilty as charged, else you should acquit him," is properly refused since the first statement therein is misleading.

APPEAL from Randolph Circuit Court.

Heard before Hon. S. L. BREWER.

John Smith was convicted of unlawfully selling liquor, and appeals. Affirmed.

The witness Ford, in answer to the question as to whom he was working for in the case, stated that he was a marshal of Roanoke and working in the interest of the Law and Order League of the county, and as marshal desired to see the law enforced. The state was permitted to ask the witness Cofield, "You have served a term in the penitentiary, haven't you, Isam?" and his answer thereto was that he had. To the question, "What was you sent to the penitentiary for?" came the answer, "For murder," and to the question, "How long did you stay in the penitentiary?" was the answer, "Six and a half years." The following charge was refused to the defendant: "I charge you, gentlemen of the jury, that you cannot convict a man on any sort of evidence; but the law itself demands that the proof must show beyond all reasonable doubt that the defendant at the bar is guilty as charged, else you should acquit him."

HOOTEN & OVERTON, for appellant. Counsel discuss assignments of error, but without citation of authority.

ALEXANDER M. GARRER, Attorney general, for the State.

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DENSON, J.—The defendant was indicted, tried and convicted for selling liquor in violation of the prohibition law in Randolph county. McKissick, the principal witness for the state, testified that he bought a quart of whisky from the defendant on Tuesday after the first Sunday in June, and for it paid him \$1. On cross-examination this witness was asked this question: "You were arrested for selling whisky in Roanoke about the 1st of June yourself, weren't you?" The court sustained the solicitor's objection to the question. In this ruling there was no error.—*Smith's Case*, 129 Ala. 89, 29 South. 699, 87 Am. St. Rep. 47; *Gordon's Case*, 140 Ala. 29, 36 South. 1009; *Wilkerson's Case*, 140 Ala. 165, 37 South. 265; *Williams' Case*, 144 Ala. 14, 40 South. 405.

If the court erred in sustaining the state's objection to the question asked witness Ford, "Who are you at work for in this case?" the error was without injury, as the subsequent testimony of the witness is a full answer to the question.

No error is involved in the rulings of the court overruling objections made to questions propounded to defendant's witness Cofield by the state.—*Castleberry's Case*, 135 Ala. 24, 33 South. 431; Code 1907, §§ 4008, 4009, and cases cited under those sections.

The charge refused to defendant is confusing and misleading in its first statement, and was properly refused.

There is no error in the record, and the judgment of conviction is affirmed.

Affirmed.

TYSON, C. J., and SIMPSON and MAYFIELD, JJ., concur.

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Marks v. The State.

Selling Spirituous Liquor Without License.

(Decided Feb. 18, 1909. 48 South, 864.)

1. *Evidence; Judicial Knowledge; Intoxicating Liquors.*—Courts cannot take judicial knowledge that mead or metheglin is an alcoholic, spirituous, vinous, malt or intoxicating liquor or beverage, or that it will produce intoxication if drunk to excess.

2. *Intozication Liquors; Statute; Construction.*—Section 1 of General Acts, 1907, 1st Special Session, by the use of the terms "or other liquors or beverages by whatsoever name called, which if drunk to excess, will produce intoxication" does not mean to qualify and relate to each and all of the liquors or beverages which precede such clause, and hence, the statute does not prohibit the sale of such other beverages or liquors unless they contain sufficient alcohol to produce intoxication if drunk to excess.

3. *Same; Contents; Jury Question.*—It is a question of fact for the jury to determine whether a beverage contains 1.46% alcohol by weight, and 1.88% by volume, and 1.20% maltose, making about two and a half teaspoonfuls of alcohol to the pint, is an alcoholic, spirituous, vinous, malt or intoxicating liquors, or whether if drunk to excess, will produce intoxication.

4. *Same; Statutes; Prohibition.*—Where a statute named designates or enumerates classes or species of beverages or liquors which are prohibited to be sold or dealt with, and it clearly appears that a given beverage is within the scope of the forbidden enumeration, and is intoxicating, its properties are immaterial, and not a subject of inquiry in a prosecution for the wrongful sale thereof.

5. *Same; Statutes; Legislative Power.*—It is within the power of the legislature to absolutely prohibit the sale of intoxicating beverages, to say what are intoxicating, what are prohibited and what are not, and to designate them by general or special terms.

6. *Same; Definition.*—Intoxicating liquors are liquors intended for use as a beverage, and capable of being used as such, which contain alcohol in such per cent that they will produce intoxication when imbibed in such quantities as may be practically drank; and this, regardless of how the alcoholic constituents are obtained; but the term, intoxicating liquors, is not synonymous with spirituous, liquors, since all spirituous liquors are intoxicating liquors, yet all intoxicating liquors are not spirituous liquors.

7. *Same; Wrongful Sale; Complaint; Time.*—Where the indictment or affidavit attempts to charge an offense against a statute which went into operation within twelve months from the time of the filing of the complaint, time becomes a material ingredient of the offense, and the complaint is fatally defective, if it fails to allege that it was committed after the act took effect.

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8. *Words and Phrases; Intoxicating Liquors; Alcoholic or Spirituous Liquors.*—The phrase, alcoholic or spirituous liquors, necessarily means intoxicating liquors.

9. *Same; Spirituous and Intoxicating Liquors.*—Pure Alcohol is within the term, spirituous and intoxicating liquors.

10. *Same; Liquors or Liquor.*—The term, liquors or liquor, includes all kinds of intoxicating decoctions, whether spirituous, vinous, malt or alcoholic.

11. *Same; Whisky.*—Whisky is alcohol diluted with water and mixed with other elements or ingredients.

12. *Same; Alcoholic.*—Alcoholic means containing or pertaining to alcohol, and alcohol has but one source, viz., fermentation, and is extracted from its by-products by distillation, and while it is the intoxicating principle of all drink within the meaning of ordinary prohibition, statute, it is rarely used in its pure state as a beverage.

13. *Same; Intoxicating Bitters.*—Intoxicating bitters include those bitters, beverages, or decoctions in which the distinctive character and effect of intoxicating liquors are present, so that it may be used as a beverage, notwithstanding its other ingredient; and though the other ingredients are medical and predominate, and alcohol is used to preserve these medical properties and serve as a vehicle therefor, if it can be used as a beverage, then it may or may not be included in the prohibition statute unless the statute specially so declares by name, depending on the evidence in the particular case, since the court cannot declare, as a matter of law, that particular beverages or bitters are or are not intoxicating.

14. *Same; Malt Liquors.*—Porter, ale, beer, etc., are embraced in the term, malt liquors, and are the product of a process by which grain is steeped in water to the point of germination, the starch being thus converted into saccharine, which is kiln dried, then mixed with hops, and by further process of brewing made into a beverage.

15. *Same; Vinous Liquor.*—Vinous liquor means liquor made from the juice of grapes, and may also include wines made from fruit or berries, by process of fermentation by the addition of sugar and alcohol.

16. *Same; Spirituous Liquor.*—Spirituous liquor is liquor composed in whole or in part of alcohol, extracted by distillation, such as whisky, brandy or rum, and these liquors are regarded as spirituous or intoxicating without the necessity of proof.

APPEAL from Jefferson Criminal Court.

Heard before Hon. A. C. Howze.

Julius Marks was convicted of selling mead, a spirituous liquor, and he appeals. Reversed and remanded.

JOHN T. GLOVER, and A. LEO OBERDORFER, for appellant. The demurrers to the indictment should have been sustained.—*Noles v. The State*, 26 Ala. 31; *Dentler v.*

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The State, 122 Ala. 70; *Bibb v. The State*, 83 Ala. 84; *Dorman v. The State*, 34 Ala. 216 and cases there cited; 1 Ency. P. & P. 68; 22 Cyc. 361. The third count does not charge that mead is a beverage. Counsel discuss assignments of error relative to evidence, but without citations of authority. The court improperly gave charge 1.—*Thompson v. The State*, 122 Ala. 12; *Maddox v. The State*, 122 Ala. 110; *Sims v. The State*, 99 Ala. 161. The court does not judicially know that mead is an intoxicant or that it is an alcoholic, spirituous, vinous or malt liquor, and in the absence of evidence showing that it is such, no conviction can be held.—*Daniel v. The State*, 43 South. 22; *Allred v. The State*, 8 South. 56; *Brantley v. The State*, 8 South. 816; *Carl v. The State*, 87 Ala. 17. See also in this connection.—*Kansas Liquor Cases*, 37 Am. Rep. 287; *Wadsworth v. Dunham*, 13 South. 597; *U. S. v. Goldberg*, 168 U. S. 103; 26 A. & E. Ency. of Law, 613; *Thompkins County v. Taylor*, 21 N. Y. 173; *Foster v. The State*, 36 Ark. 258; 3 Mich. 330; 96 Tenn. 544; 51 S. W. 381; *Wall v. The State*, 78 Ala. 411; 87 Ga. 687; 91 Ga. 227.

ALEXANDER M. GARBER, Attorney General, and THOMAS W. MARTIN, Assistant Attorney General, for the State. The demurrers to the indictment were properly overruled.—*McDowdell v. The State*, 61 Ala. 172; *McIntyre v. The State*, 55 Ala. 167; *Lyon v. The State*, 61 Ala. 224; *Harris v. The State*, 60 Ala. 50; *Adams v. The State*, 60 Ala. 52; *Mollett v. The State*, 33 Ala. 409. The prosecution was begun by affidavit, and the allegations come up to the rule in such cases.—*Brazzelton v. The State*, 66 Ala. 96; *Bell v. The State*, 75 Ala. 25; *Randle v. The State*, 46 South. 759. It is unnecessary to aver the name of the person whom the defendant aided

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or abetted.—*Jones v. The State*, 136 Ala. 118. The offenses are of the same general nature.—Section 7151, Code 1907; *McClellan v. The State*, 118 Ala. 122; *Thomas v. The State*, 111 Ala. 51. The opinion concerning the intoxicating character of mead was properly admitted.—*Knowles Case*, 80 Ala. 9; *Brantley v. The State*, 90 Ala. 47. The court judicially knows the definition of the terms, spirituous, vinous or malt liquors.—*Miller v. The State*, 107 Ala. 40; *Allred v. The State*, 80 Ala. 112; *Feibleman v. The State*, 130 Ala. 122; *Daniel v. The State*, 149 Ala. 44; *Dinkins v. The State*, 149 Ala. 49; 23 Cyc. 22. On these authorities and authorities supra, the court committed no error in the admissions and exclusion of evidence.

MAYFIELD, J.—This appeal involves questions which require a construction of the general prohibition laws of this state, not necessarily as to the constitutionality of such laws, but as to the meaning, interpretation, and effect of certain provisions contained therein. The prosecution was commenced by, and was based solely upon, an affidavit containing three counts. The first attempted to charge that defendant aided, abetted, or procured an unlawful sale, purchase, or other unlawful disposition of spirituous, vinous, or malt liquors, etc.; second, that defendant acted as agent or assisting friend of the seller or purchaser in procuring an unlawful sale or purchase of such liquors, etc.; third, that defendant sold spirituous, vinous or malt liquors, or mead, which, if drunk to excess, will produce intoxication. The defendant demurred to the affidavit or complaint, and assigned many grounds therefor, too numerous to mention.

The court overruled the demurrer, and trial was upon the general issue. The court, at the request of the state, gave the general affirmative charge for the state as to

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the third count, refused a like charge to the defendant as to each count separately, and refused a great number of other charges requested by the defendant. The jury after being out for an hour or more, returned to the court for further instruction. The foreman inquired of the court if the jury had to find that mead would intoxicate. The court replied that the giving of the general affirmative charge relieved them of that; that this charge meant that if the jury believed the evidence beyond a reasonable doubt they must convict the defendant which action of the court was excepted to by defendant.

Many questions are reserved as to rulings of the trial court touching the evidence. The trial resulted in a conviction under the third count only, and a fine of \$50 was imposed.

The first two counts each attempted to charge an offense under section 7363 of the Code of 1907, which section is codified from the act of March 12, 1907 (Acts 1907, p. 366). The third count evidently attempted to charge an offense under the general statutory prohibition law known as the "Carmichael Bill," passed at the extraordinary session, and approved November 23, 1907 (Gen. Acts sp. Sess. 1907, pp. 71-76.)

The verdict and judgment eliminated all questions as to the first two counts, and render unnecessary a decision or construction of section 7363 of the Code of 1907, but require a construction of section 1 of the act of November 23, 1907 (above referred to), reading as follows: "Section 1. Be it enacted by the Legislature of Alabama, that it shall be unlawful for any person, firm, corporation, or association, within this state to manufacture, sell, barter, exchange, give away to induce trade, furnish at public places or otherwise dispose of any alcoholic, spirituous, vinous or malt liquors, intoxicating biters or beverages or other liquors or beverages by whatso-

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ever name called, which if drunk to excess will produce intoxication, except as hereinafter provided." This section has never been codified, having been passed after the adoption of the Code, and hence is not controlled by any Code provisions or prior statutes, through some of the Code provisions are applicable to prosecutions under it, and it may be construed in *pari materia* with other provisions of our laws.

It was admitted that defendant sold one bottle of a beverage known as "mead" (a beverage sometimes called "metheglin," made of water and honey), since the 1st day of January, 1908, when the prohibition law went into effect as to Jefferson county. This was the only disposition of any liquor or beverage by the defendant which was attempted to be proven. The state introduced in proof a chemical analysis of another bottle of the beverage known as "mead," and some evidence tending to show it was a malt and intoxicating liquor; while the defendant's evidence tended to show that it was not an intoxicating or malt liquor. It was conceded, however, that it contained maltose and alcohol; but it was contended by the defendant that it did not contain either in such quantities, or in such form, or under such conditions as to come within the meaning of the statute.

The trial court instructed the jury that if they believed the evidence beyond a reasonable doubt they must find the defendant guilty under the third count. This charge can be supported or justified only upon the theory that mead is either an "alcoholic," "spirituous," "vinous," "malt," or "intoxicating" liquor or beverage, within the meaning of the statute. If the statute inhibits the sale of all liquor or beverage which contains any alcohol or malt, then the charge of the court was correct; otherwise, it was erroneous. Whether or not this beverage was an intoxicant was evidently considered immate-

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rial by the trial court. Under no other theory can this action of the trial court be justified. In this we think the trial court was in error.

This court does not judicially know that mead or metheglin is an alcoholic, spirituous, vinous, malt, or intoxicating liquor or beverage, or that, if it is drunk to excess, it will produce intoxication. Nor do we think that the fact that it contains 1.46 per cent. of alcohol by weight, and 1.88 per cent. by volume, and 1.20 per cent maltose, making about $2\frac{1}{2}$ teaspoonfuls of alcohol to the pint, makes it as a matter of law within the inhibition of the statute. We are therefore clearly of the opinion that it was a question for the jury, under the evidence, to say whether or not mead was alcoholic, spirituous, vinous, malt, or intoxicating, or whether it was a liquor or beverage which, if drunk to excess, will produce intoxication. In other words, was the liquor or beverage sold within the inhibition of the statute? That was clearly a question of fact under the evidence, and not one of law.

If the statute had prohibited the sale of mead, or declared that it was an alcoholic, spirituous, vinous, malt, or intoxicating liquor or beverage, or if the court judicially knew that it was within any one of these classes, then under the evidence in this case the court could probably have given the affirmative charge; but it clearly appears that, if mead is within the inhibition of the statute, it is clearly under the last clause of the first section of the statute, which inhibits the sale, etc., of "other liquors or beverages by whatsoever name called, which if drunk to excess will produce intoxication," and the evidence was in dispute as to whether or not it would produce intoxication, if drunk to excess. One witness, shown to be a highly educated physician, testified in substance that a man's stomach would not contain

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enough of the beverage to produce intoxication; that enough might be taken in the stomach to produce a thrill, but nothing more. Another witness testified that he had drunk a great deal of mead—as much as four bottles in an hour—and that it would not intoxicate. True, there was some evidence to show it would intoxicate if drunk to excess, and, while we can no more pass upon the weight or sufficiency of the evidence than could the trial court, yet we do say there was ample evidence to require the submission of this fact to the jury.

While we agree in part with counsel for appellant, we cannot concur with them in the contention (so forcefully and ably insisted upon) to the effect that the clause “which if drunk to excess will produce intoxication,” qualifies and relates to each and all of the liquors or beverages which precede it—that is, to alcoholic, spirituous, vinous, or malt drinks. We are inclined to the opinion that this phrase qualifies or refers only to the clause, “or other liquors or beverages by whatsoever name called,” which immediately precedes it, and which two phrases, taken together, constitute one of the six classes of liquor and beverage the sale of which is prohibited. We are led to this conclusion, not alone by the composition and grammatical construction of this section of the act, but also by a reference to the history of such legislation in this and other states, and the judicial construction put upon the terms “spirituous,” “vinous,” “malt,” and “intoxicating” liquors and beverages by this and other courts. These terms each had a well defined and accepted judicial construction by the courts, when used in such statutes; and it does not appear that there was any intention to change that well accepted judicial construction. They were severally treated as being well known and defined; but the phrase, “or other liquors or beverages by whatsoever name call-

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ed," is clearly shown not to refer to every well known or defined class, but is intended to include any and all other classes or kinds, not embraced in the foregoing five classes named, "which if drunk to excess will produce intoxication."

It is said by counsel that the punctuation of the section shows that this phrase refers to all the preceding classes. Punctuation may be looked to, for the purpose of aiding in ascertaining the meaning. It is intended to make the meaning apparent and more readily ascertainable than it would otherwise be; but it can never control or destroy a meaning which is otherwise apparent and certain. When a prohibition statute names, designates, or enumerates the kinds, classes, or species of beverages or liquors against which its provisions are directed, then there is no room for further inquiry into the scope of such statute. When it clearly appears that a given article, liquor, or beverage comes within the scope of the forbidding enumeration, and is intoxicating, its properties become immaterial to courts and juries, because fixed by the lawmaking power of the state.

The courts have uniformly upheld the power of the Legislature to declare certain drinks and beverages intoxicating, when in truth and in fact they may not be so, though it is not conceded that this power is without limit. The Legislature might go to such an extent that the courts would hold it to be an unreasonable exercise of the police power—far-reaching and comprehensive as it is. The courts would probably not uphold a statute which prohibited the use or sale of a necessary commodity, such as sugar or molasses, corn or barley, under the guise of a prohibition law, which denominated them intoxicants, because they were capable of being converted into alcohol or spirituous liquors. But as to this question we do not decide, nor do we hereby mean to inti-

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mate an opinion, but only refer to it to demonstrate the correctness of the construction which we place upon this section of the statute.

The Legislature have the undoubted right to prohibit absolutely the sale of intoxicating beverages, and to say what are intoxicating, what are prohibited, and what are not—to designate them by general or special terms, and to so frame and word the law as to prevent evasion of its provisions (which is known to be often attempted); and courts will not put such construction on the law as would render it void if dependent upon only one of these legislative powers, when it would be perfectly valid if referred to the other or both legislative powers or functions.—*Black on Intoxicating Liquors*, § 43; *Feibelman v. State*, 130 Ala. 122, 30 South. 384; *Wadsworth v. Dunnam*, 98 Ala. 610, 13 South. 597. When, however, the statute uses merely general terms, such as “alcoholic,” “spirituous,” “vinous,” “malt,” and “intoxicating” liquors or beverages, then it is a question for the courts or juries to determine, according to the facts in each particular case, whether a given liquor, beverage, or fluid is within the inhibition of the statute. Sometimes it is then a question of law for the court, and sometimes a question of fact for the jury.

Most of the terms used in this statute have been frequently construed by this court, and there is no conflict in the decisions on this subject as to those which have been construed. It is therefore only necessary to enumerate them, and cite the cases.

“Spirituous liquor” is that which is in whole or in part composed of alcohol extracted by distillation. Whisky, brandy, and rum are examples. That these are spirituous or intoxicating is known to courts and juries, and proof thereof is not necessary.—*Tinker v. State*, 90 Ala. 638, 8 South. 814; *Allred's Case*, 89 Ala. 113, 8 South. 56.

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“Vinous liquor,” *ex vi termini*, means liquor made from the juice of the grape; but it may include wines made from fruits or berries by a like process of fermentation, when sugar and alcohol are added.—*Allred's Case*, 89 Ala. 112, 8 South. 56; *Adler's Case*, 5 Ala. 24; *Hinton v. State*, 132 Ala. 29, 31 South. 563.

“Malt liquors” are the product of a process by which grain is steeped in water to the point of germination, the starch of the grain being thus converted into saccharine matter, which is kiln dried, then mixed with hops, and, by a further process of brewing, made into a beverage. The term embraces porter, ale, beer, and the like.—*Allred v. State*, 89 Ala. 112, 8 South. 56; 1 Mayfield's Dig. 463; *Tinker's Case*, 90 Ala. 647, 8 South. 814.

“Intoxicating liquors” are any liquors intended for use as a beverage, or capable of being so used, which contain alcohol (no matter how obtained) in such per cent. that they will produce intoxication when imbibed in such quantities as may practically be drunk. The term is not, however, synonymous with “spirituous liquors.” All spirituous liquors are intoxicating, but all intoxicating liquors are not spirituous.—Black on Intox. § 2; *Allred's Case*, 89 Ala. 112, 8 South. 56.

“Intoxicating bitters.” This term has been held to include those bitters, beverages, or decoctions in which the distinctive character and effect of intoxicating liquors are present, so that it may be used as a beverage, notwithstanding the other ingredients it may contain. If, however, it can be so used as a beverage, though the other ingredients are medicinal and predominate, and alcohol is used to preserve these medicinal ingredients, and serve as a vehicle for them, then it may or may not be included, depending upon the evidence in each particular case. It is not within the power or province of any court to declare, as a matter of law, that any parti-

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cular bitters or beverage is or is not intoxicating, unless the statute or other law so declares, or it be one the effect of which every one is presumed to know—if such there be.—*Carl's Case*, 87 Ala. 17, 6 South. 118, 4 L. R. A. 380; *Id.*, 89 Ala. 97, 8 South. 156. See, also, 23 Cyc. 58, 266; Black on Intox. Liquors, § 9.

The foregoing terms used to designate the intoxicants inhibited by this statute are all well defined in this state; but the term “alcohol liquors” is comparatively a new term. If not new, it is not of such common use, and has not been judicially construed so often, as those indicated above.

“Alcoholic,” *ex vi termini*, means “containing or pertaining to alcohol.” “Alcohol” has been frequently defined by courts, in construing prohibition and kindred statutes relating to intoxicating liquors. It is defined as a volatile organic body, a limpid colorless liquid, hot and pungent to the taste, having a slight, but not offensive, scent. It has but one source, fermentation, and is extracted from its by-products by distillation; its purity and strength depending upon the degree of perfection or completeness of distillation. While it is the intoxicating principle, the basis of all intoxicating drinks—certainly so within the meaning of ordinary prohibition statutes—yet pure alcohol is rarely used as a beverage.

Whisky is alcohol diluted with water and mixed with other elements or ingredients.—*Intoxicating Liquor Cases*, 25 Kan. 751, 37 Am. Rep. 284; *Com. v. Morgan*, 149 Mass. 314, 21 N. E. 369; *State v. Giersch*, 98 N. C. 720, 4 S. E. 193.

The term “liquor” or “liquors” commonly includes all kinds of intoxicating decoctions, liquids, or beverages, whether spirituous, vinous, malt, or alcoholic.—*People v. Crilley*, 20 Barb. (N. Y.) 248; *State v. Brittain*, 89 N. C. 576.

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Whether pure alcohol comes within the phrases “spirituous” or “intoxicating” liquors is a question not well settled—some courts holding that it depends upon the language of the particular statute and the facts of each particular case, whether it was sold or purchased purely for medicinal or mechanical purposes, or to be used as an intoxicating beverage; but the weight of the authorities seems to be to the effect that, unless otherwise made by the language or provisions of the statute, it will be included in the terms “spirituous” and intoxicating” liquors.—*Snider v. State*, 81 Ga. 753, 7 S. E. 631, 12 Am. St. Rep. 350; *Rabe v. State*, 39 Ark. 204; *State v. Martin*, 34 Ark. 340; *Bennett v. State*, 30 Ill. 389; Black on Intox. Liq. § 11.

The Supreme Court of Mississippi has held that wine is within the phrase “alcoholic or vinous liquors.”—*Reyfelt v. State*, 73 Miss 415, 18 South. 925. The Court of Appeals of Georgia has recently construed the Georgia prohibition law, of which our statute is in part a copy, and, while we have seen nothing except what purports to be a manuscript copy of the opinion, that court seems to have construed this term “alcoholic liquors” in accordance with the writer’s view of the meaning of that phrase as it appears in our statute. The decoction sold or kept in that case was called “Green or Pale Beer.” Samples of it were analyzed, and one found to contain 4.2 per cent., and another 3.8 per cent., of alcohol. The trial court in that case held, as we presume it did in the case at bar, that the Georgia statute, which as to this question is nearly identical with our own, includes any liquor which has an appreciable quantity of alcohol therein. The Court of Appeals of Georgia reversed the case upon this question, and held that the statute included only those liquors or beverages which contain a sufficient

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quantity of alcohol to produce intoxication when drunk to excess. That the phrase "alcoholic or spirituous liquors" necessarily means intoxicating liquors is sustained, in the case last referred to, by citation of two Georgia cases.—*Bell v. State*, 91 Ga. 227, 18 S. E. 288, and *McDuffie v. State*, 87 Ga. 687, 13 S. E. 596.

After a careful study of the general prohibition law of this state, the one in question in this case, and comparing it with numerous others which have been construed by this and other courts, giving due weight to the fact that it was enacted with this known construction placed upon several or nearly all of the six classes or species of drinks or beverages named therein, we do not think that the statute embraces every liquor or beverage which contains a trace of alcohol or maltose, or even that contains one or both in appreciable quantities, if capable of being used as an intoxicating beverage. Such interpretation would be unreasonable, if not absurd. Where a statute has been construed, and is subsequently re-enacted, the previous construction becomes a part of the statute itself.—*Southern Railway Co. v. Moore*, 128 Ala. 450, 29 South. 659.

The statute under consideration is but the extension of kindred prohibition statutes to the entire state which were theretofore local. True, it contains provisions not heretofore embodied in local statutes, which new provisions must yet be construed. The objects and purposes of those statutes had been defined by the courts; and, being incorporated and re-enacted in the general law, they bring with them such judicial constructions. The main object and purpose of all is the same. Some may be restricted, and some more extensive and exclusive than others; but the main object and purpose of all, as said by Justice Somerville, in *Carl's Case*, 87 Ala. 17, 6 South. 118, 4 L. R. A. 308, is "to promote temper-

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ance and prevent drunkenness. The mode adopted to accomplish this end is the prevention of the sale, the giving away, or other disposition of intoxicating liquors. The evil to be remedied is the use of intoxicating liquors as a beverage, rather than as an ingredient of medicines and articles of toilet, or for culinary purposes, and the object of the law in this particular must not be lost sight of in its interpretation."

However, if the article sold or disposed of is clearly within the inhibition of the statute, the fact that it was sold for medicine, etc., or that the dispenser did not know it contained ingredients which brought it within the statute, would be no defense, unless it was so expressly excepted or provided by the statute. This court in *Carson's Case*, 69 Ala. 241, which is quoted in *Carl's Case*, 87 Ala. 20, 21, 6 South. 118, 4 L. R. A. 380, says: "We are not to be supposed as intimating that physicians or druggists would be prohibited, under a statute such as the one in question, from the bona fide use of spirituous liquors in the necessary compounding of medicines manufactured, mixed, or sold by them. This would not be within the evils intended to be remedied by such prohibitory enactment, nor within the strict letter of the statute." And in *Wall's Case*, which is also quoted in *Carl's Case*, it was said: "There may be cases, perhaps, where the bona fide use of a moderate quantity of spirituous liquors in a medical tonic would not alone bring a beverage (or decoction) within the statute."—78 Ala. 417.

The famous "Kansas prohibition law" (Laws 1881, p. 239, c. 128, § 10) prohibited "all liquors and mixtures by whatsoever name called that will produce intoxication." This law was construed by Justice Brewer, and has probably become the leading decision of the United States in construing such laws, and has been time and

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time again quoted by this court and others in construing prohibition laws, and by the text-book writers on the subject, as announcing the fundamental principles which should control in construing these laws. Nearly as much might be said of *Carl's Case*. Both of these cases announce and affirm the doctrine that "the mere presence of alcohol does not bring an article within the prohibition." The influence of the alcohol may be counteracted by other ingredients, and the compound be strictly and fairly only a medicine, or a toilet or culinary article, unfit for use as an intoxicating beverage, against which the statute or law is leveled; yet, if the intoxicant prohibited remains in the compound as a distinctive force, and the compound is reasonably liable to be used as a beverage, it is then within the statute, though it may still be very beneficial as a medicine, or toilet, culinary, or mechanical article. That is to say, it was not the intention of the lawmakers to render a person guilty of violating a prohibition law who disposes of a medicine, or toilet or culinary article, because the purchaser misuses it and becomes intoxicated; but, on the other hand, they have so framed the laws, and they are so intended, that they cannot be evaded by selling articles or compounds as medicines, or toilet or culinary, or soft drinks or beverages, as nonintoxicating, which are as a matter of fact and truth intoxicating beverages. Selling wine or beer, called or labeled "vinegar," or "lemon syrup," would be as much within the statute as selling them by their real names. Yet selling Blue Lick or Stafford's Springs water would not be an offense, though labelled "Cream of Kentucky," "Three Feathers," "Whiskey," etc. Nor is the sale of camphor, paregoric, or bay rum within the statute, though containing alcohol in large quantities; yet any compound which contains alcohol—the almost uni-

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versal and sole intoxicating ingredient of all beverages—and is capable of being, or as a matter of fact is, used as an intoxicating beverage, may be within the statute, though not compounded as such beverage, and though used for other legitimate purposes.

As said before in this opinion, when the law names, enumerates, or defines certain articles, compounds, decoctions, beverages, or liquors as intoxicants, and prohibits their use, this may be conclusive upon the courts and juries; but when the law uses general terms only, such as “spirituous,” “alcoholic,” “vinous,” or “malt” and intoxicating liquors and beverages, and fails to define these, then it is for the courts and juries to determine what articles are within and what are without the statute. When the article is one which everybody knows falls within one of the particular classes, such as whisky, brandy, wine, rum, ale, lager beer, etc., then the courts and the juries know this as well as the public, and no proof is required to show that it is within the statute; but if it is “hop jack,” “synconic bitters,” mead (meth-e-glin), cider, nearbeer, pale beer, etc., then it requires proof to show that it is within one or the other of these general terms, unless the law itself enumerates or names it as being prohibited. The mere fact that one of these last articles named is a compound, and contains one or more ingredients which enter into or form a part of articles which are clearly prohibited, does not make such compound or article within the prohibited class; that is, every article that contains alcohol is not prohibited, because whisky contains alcohol and it is prohibited, or because it contains malt and lager beer contains malt, and is prohibited. But if it contains elements and ingredients in such proportion or in such form as to bring it within one of the general clauses named in the law, then it is prohibited; otherwise, not. In other words,

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the term "alcoholic liquors," as used in the law, does not necessarily include every article or compound which contains alcohol. On the other hand, it does embrace all articles which contain alcohol or malt in such proportions or form or state, which are or may be used as an intoxicating beverage, no matter what it is called, or what else it contains, or for what other purpose it was intended or is used, or for which it may be used, and although the vendor or disposer did not know it contained such ingredients or could be so used as an intoxicating beverage, unless the law expressly so excepts such article or such disposition.—*Carl's Case*, 87 Ala. 17, 6 South. 118, 4 L. R. A. 380; *Wall's Case*, 78 Ala. 417; *Carson's Case*, 69 Ala. 236; *Ryall's Case*, 78 Ala. 410; *Allred's Case*, 89 Ala. 112, 8 South. 56; *Adler's Case*, 55 Ala. 16; *Tinker v. State*, 90 Ala. 648, 8 South. 814; *Watson's Case*, 55 Ala. 159; *Knowles' Case* 80 Ala. 9; *Compton's Case*, 95 Ala. 25, 11 South. 69; *Wadsworth v. Dunnam*, 98 Ala. 610, 13 South. 597; *Freiberg v. State*, 94 Ala. 92, 10 South. 703; *Hinton v. State*, 132 Ala. 29, 31 South. 563; *Feibelman v. State*, 130 Ala. 122, 30 South. 384; *Costello v. State*, 130 Ala. 143, 30 South. 376; *Kansas Liquor Cases*, 25 Kan. 751, 37 Am. Rep. 284; Black, Intox. Liq. §! 1-18; 23 Cyc. pp. 57-63; 17 Am. & Eng. Ency. Law (2d Ed.) pp. 197-206.

The third count of the affidavit or complaint under which this conviction was had is bad, and the demurrer thereto should have been sustained. It is conceded that it attempted to charge, and could only charge, an offense under the prohibition law, which went into effect as to Jefferson county on the 1st day of January, 1908. The affidavit was made on the 1st day of May, 1908. It should have showed that the alleged offense was committed after the 1st day of January, 1908. This was necessary to charge an offense. If the sale had been prior

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to that date, and within a year, as alleged, it would have been necessary to allege that the sale was "without a license and contrary to law," to be sufficient under the law as it existed at that time. This much was necessary to show that any offense was committed. While the statute in this state dispenses with allegations as to a particular time, unless time is a material ingredient of the offense (Code 1907, § 7139), yet in the case at bar time is a material ingredient—that is, to the extent of showing that it was committed after January 1, 1908.—*Bibb v. State*, 83 Ala. 84, 3 South. 711; *Dentler's Case*, 112 Ala. 70, 20 South. 592; *McIntyre's Case*, 55 Ala. 167; *Glenn's Case*, 158 Ala. 48 South. 505.

As the case must be reversed, it is unnecessary to discuss or pass upon the other assignments of error, for the reason that they may not arise upon another trial; but we feel impelled to say that many of them appear to be well taken. It is proper, however, to say here that we do not mean to imply that it shows any lack of consideration, fairness, or capacity on the part of the trial court, but that the errors, if errors they be, were almost all as to questions which depended upon the construction of the statute and the court was not without authority and reason for the construction he placed upon it, notwithstanding it was not the correct one.

The judgment must be reversed, and the cause remanded.

Reversed and remanded. All the Justices concur.

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Violation of Prohibition Law.

(Decided Feb. 4, 1909. 48 South, 700.)

1. *Statutes; Subjects and Title.*—Section 45, Constitution 1901, requires that a law have but one title, and the provisions of it are satisfied if the law has but one general subject, which will support all matters reasonably connected with it, fairly indicated in the title, and all proper agencies which may facilitate its accomplishments, are germane to the title; the form of the title must be left to the legislature and not to the courts.

2. *Same.*—Local Acts 1900-01, p. 688, is not violative of section 45, Constitution 1901.

3. *Indictment and Information; Misdemeanors; Legislative Authority to Dispense With.*—The legislature is authorized to dispense with indictments and to authorize prosecutions and trials upon affidavit or complaint in misdemeanor cases.

4. *Intoxicating Liquors.*—The evidence in this case stated and examined and held sufficient to sustain a conviction for dealing in intoxicating liquors in violation of Local Acts 1907, p. 249.

5. *Appeal and Error; Harmless Error; Refusal of Instruction.*—The refusal to defendant of all requested charges is not prejudicial where all the evidence, including that of the accused himself clearly shows his guilt, presenting a case for the general affirmative charge if such a charge can be given in a criminal case.

6. *Same; Evidence.*—The admission of testimony in a prosecution for violation of the prohibition law that an election has been held in the county under the law was cured by the introduction of record evidence of the election and the result thereof as provided by the Act.

7. *Fines; County Convicts; Costs; Rate.*—Under the provisions of General Acts 1907 (1 S. S.) p. 183; sec. 13, the rate per day for a county convict sentenced to hard labor for the county for the payment of the cost of his conviction, is forty cents and not thirty cents.

APPEAL from Fayette Circuit Court.

Heard before Hon. S. H. SPROTT.

John Glasscock was convicted of violating a local prohibition law, and appeals. Corrected and affirmed.

The complaint filed by the solicitor in the circuit court is as follows: "The state of Alabama, by its solicitor, W. B. Oliver, complains of John Glasscock that within

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twelve months before the commencement of this prosecution he did sell spirituous, vinous, or malt liquors without a license and contrary to law. The state of Alabama, by its solicitor, W. B. Oliver, further complains of John Glasscock that within twelve months before the commencement of this prosecution, he did sell, give away, deliver, or otherwise dispose of spirituous, vinous, or malt liquors contrary to law." Objection was made to this complaint, because it was a departure from the original affidavit, and because this was an appeal from the county court of Fayette county, in which a trial by jury was demanded, and that before the case could properly be in the circuit court an indictment by grand jury must have been preferred. The witness for the state testified that on the first Sunday in February, 1908, he purchased a quart bottle of liquor from the defendant, paid him \$1 for it, and that the defendant and his son delivered the same at the house of the witness. The defendant's evidence was that he had some phosphate gin at his house and that he told the state's witness where it was, after the state's witness had asked him several times for whisky, and that he knew the boys who were with the witness, so told them where the whisky was in his house, and to go and steal it, or get it some way, and drink it up, but that he received no money for it. It was admitted that the alleged gift or sale was within the corporate limits of the town of Fayette, that the house of defendant was within said incorporation, and that the town was incorporated and had police jurisdiction both day and night. The defendant requested the affirmative charge, and another charge, as follows: "If the jury believe from all the evidence in this case that it was only a gift of the alleged whisky, and that defendant did not receive anything for the same, then you must find the defendant not guilty."

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ROBERT F. PETERS, for appellant. The defendant's motion to strike and also the motion assailing the constitutionality of the act under which the cause was transferred should have been sustained.—Acts 1901, p. 688; *State v. Southern Ry. Co.*, 115 Ala. 250; *Montgomery v. The State*, 88 Ala. 141; *Ex parte Reynolds*, 87 Ala. 138; *Ex parte Cowart*, 92 Ala. 94; *Stewart v. Commissioners*, 82 Ala. 209. The question is not so much whether all the matters treated in one and the same statute could be treated as a single subject matter, but whether they were so treated in the act under consideration.—*Ballantyne v. Wickersham*, 75 Ala. 533; *Rodgers v. Tolbert*, 58 Ala. 523. If, for any reason the act was defective, the matter should have gone to the grand jury.—*Reeves v. The State*, 96 Ala. 33; *Collins v. The State*, 88 Ala. 212. The petition and alleged order only shows a purpose to prohibit a sale and under the special act, the defendant could not be convicted for giving.—*State v. Davis*, 130 Ala. 148; *Watson v. The State*, 140 Ala. 134; *Yohn v. Merritt*, 117 Ala. 485; *Miller v. Jones*, 80 Ala. 89. The court erred in sentencing the prisoner to pay costs at 30 cents per day.

ALEXANDER M. GARBER, Attorney-General, for the State. It is competent for the Legislature to regulate the trial of misdemeanors as was done in this instance (Acts 1900-01, p. 689), and to provide that on appeal from the county to the circuit court, the trial should be on the affidavit and warrant without the intervention of the grand jury.—*Witt v. The State*, 130 Ala. 129. The Act of 1907, pp. 200 and 96, is constitutional and valid.

MAYFIELD, J.—The appellant appeals from a conviction for violating the local prohibition laws of Fayette county. The prosecution was based upon an affidavit

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and warrant made returnable to the county court of Fayette county. The defendant demanded a jury trial in the county court, and by local statute the cause was transferred to the circuit court of such county, where a jury trial was had. The trial resulted in a conviction, and from the judgment thereupon the defendant appeals.

The defendant assails the constitutionality of two local statutes of Fayette county; the first being entitled "In relation to trials of misdemeanors in Fayette county, Alabama" (Loc. Acts 1900-01, pp. 689, 690), and the second being a local prohibition act for that county, approved February 26, 1907 (Loc. Acts 1907, p. 249). It is insisted by counsel for appellant that the first act is void because the title thereof does not conform to the requirements of section 2, art. 4, of the Constitution of 1875, now section 45 of the Constitution of 1901, which provides, among other things, that "each law shall contain but one subject, which shall be clearly expressed in the title," etc. We fail to see anything in the title of this act which could possibly render the whole enactment void. Certainly there is but one subject, and it is clearly expressed in the title of the law, to wit, "In relation to trials of misdemeanors in Fayette county, Alabama."

This provision of the Constitution is satisfied if the act has but one general subject, fairly indicated in the title, and such title will support all matters reasonably connected with it, and all proper agencies, instrumentalities, or measures which may facilitate its accomplishment are proper and germane or cognate to the title. Much must be left to the legislative discretion, with which there cannot be judicial interference. The constitutional provision contemplates but one title to a law or act, not a multiplicity thereof. The title may

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be expressed in very general terms, or it may summarize or embrace a table of its contents, or be in the form of an index or abstract of the contents. The Constitution is complied with, in this respect, if the law or act has but one subject, and that subject is fairly indicated in the title. The form of this title must be left to the Legislature, and not to the courts. The object and purpose of this provision have probably been most clearly expressed by Judge Cooley, as follows: "First, to prevent 'hodgepodges' or 'logrolling' legislation; second, to prevent surprise or fraud upon the Legislature by means of provisions in the bills of which the title gives no information, and which might, therefore, be overlooked, and carelessly and unintentionally adopted; and, third, to fairly apprise the people, through such publication of legislative proceedings as is usually made, of the subjects of legislation that are being considered, in order that they may have the opportunity of being heard thereon, by petition or otherwise, if they so desire."—Cooley, Const. Lim. 172, quoted by Chief Justice Brickell in *Lindsay v. U. S. Savings & Loan Ass'n*, 120 Ala. 172, 24 South. 171, 42 L. R. A. 783. The following cases fully support the validity of this act, so far as this appeal is concerned, with reference to its title; *Ex parte Pollard*, 40 Ala. 90; *Ballentune's Case*, 75 Ala. 533; *State v. Rogers*, 107 Ala. 444, 19 South. 909, 32 L. R. A. 520; *State v. McCary*, 128 Ala. 139, 30 South. 641; *Key v. Jones*, 52 Ala. 238; *Boyd v. State*, 53 Ala. 606; *Adler v. State*, 55 Ala. 21.

Counsel for appellant complains of several provisions of the act, as to which this defendant has no concern, and which do not go to the whole act, nor to any part of which he can complain, as to which subjects or functions it is not necessary to decide, and we do not so decide; but, from a mere reading of the act and its title, we see

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no objection as to any of these subjects or questions. It is perfectly competent for the Legislature to dispense with indictments in misdemeanor cases, and to authorize prosecutions and trials therefor upon affidavit or complaint; and it has clearly and legally so done in this case. The act in question expressly authorizes it, and provides that the process be made returnable to the county court, and that a trial be there had by the county court judge without a jury, and that the defendant can appeal to the circuit court and there have a jury trial *de novo*, or that he can have a jury trial originally in the circuit court, by demanding it within proper time. The statute does not make the giving of the bond a condition precedent to a jury trial in the circuit court, but only requires that the defendant give bond or remain in the custody of the sheriff, or of the law, so as to appear at the circuit court for trial. This much he would have to do in any event, whether he had a jury trial or not. We fail to see anything in the act which deprives the defendant of any inalienable constitutional right.

Counsel for the appellant and the Attorney General, in their briefs, seem to wholly misconceive the statute under which this prosecution was had. It was not under either of the two general prohibition statutes—local option or general statutory—but was under a local statute passed specially for that county.—Loc. Acts 1907, p. 249. We have examined this act, and find nothing therein that renders it void so far as any question is raised on this appeal. The election held under it seems to have been in accord with the provisions of the act, and prohibition was, therefore, in effect under that act when the alleged offense is shown to have been committed. Under this act it is made an offense “to sell or to give away, deliver or otherwise dispose of spirituous, vinous or malt liquors,” etc

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Under all the evidence in the case, including that of the defendant himself, he was clearly guilty of violating this statute, and the general affirmative charge could have been given against him, if such charge can ever be given in a criminal case. Consequently there could be no injury in refusing every one of defendant's requested charges.

The original warrant and complaint filed by the solicitor were all-sufficient under either the general or the special law.

There was likewise no error in allowing the sheriff of the county to testify as to the fact that an election was held in Fayette county under the local act in question. If there could be error therein, it was cured by the introduction of the record evidence of the election and the result thereof as provided by the act.

We find no error save in the sentence of the court, by the terms of which it was adjudged that the defendant pay the costs at the rate of 30 cents per day, whereas the rate should have been 40 cents per day, in accordance with the act, passed at the extraordinary session of the Legislature.—Gen. Acts Ex. Sess. 1907, p. 183, § 13. The amount of costs is shown to be \$47.90, and defendant was sentenced to hard labor for 143 days, at 30 cents per day, to pay same, whereas he should have been sentenced for only 119 days, at the rate of 40 cents per day.

The judgment of sentence as to costs will be here amended in this respect, and, as amended, is affirmed.

Corrected and affirmed.

TYSON, C. J., and SIMPSON and DENSON, JJ., concur.

[Moore v. The State.]

Moore v. The State.*Distilling Liquor Without A License.*

(Decided Feb. 4, 1900. 48 South. 688.)

1. *Intoxicating Liquors; Evidence; Distilling; Jury Question.*—The evidence in this case stated and examined and held sufficient to require a submission to the jury of the questions of defendant's interest in the distillery, and sufficient to support a conviction.

2. *Appeal and Error; Review; Error Favorable to Appellant.*—The admission of evidence that others than defendant were operating the still on certain occasions, being favorable to the defendant, was at most harmless error.

3. *Evidence; Best Evidence; Collateral Issues.*—The question of the title and deed being wholly collateral to the main issue, it was competent for a witness to testify that he sold the land on which the distillery was operated to defendant and made him a deed there-to.

4. *Intoxicating Liquors; Distilling Without License; Instructions.*—It is not essential to a conviction for distilling without license that the person operating the still should have an interest therein, and a charge requiring a finding of the jury that defendant owned an interest in the distillery before he could be convicted, is properly refused.

5. *Same.*—A charge asserting that there must be an acquittal if the defendant did not operate the distillery alone, is properly refused as misleading.

APPEAL from Randolph Circuit Court.

Heard before Hon. S. L. BREWER.

J. T. Moore, alias, etc., was convicted of distilling without a license, and appeals. Affirmed.

The evidence sufficiently appears from the opinion. In its oral charge to the jury the court said: "If you believe beyond a reasonable doubt, from the evidence, that the defendant had any interest in the distillery which was operated in November and December, 1907, and aided in operating a distillery during November and December, 1907, in Randolph county, you will convict the defendant." The following charges were requested

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by and refused to the defendant: (1) General affirmative charge. (2) "I charge you that, unless you believe from the evidence that the defendant was a party interested in the Roanoke Distilling Company in the year 1907, then you cannot convict the defendant." (3) "I charge you that, unless you believe from the evidence beyond a reasonable doubt that the defendant operated a distillery without a license during the year 1907, then you cannot convict the defendant."

HOOTON & OVERTON, for appellant. When the principle of reasonable doubt is applied in this case we think the affirmative charge should have been given.—*Rhodes v. Otis*, 33 Ala. 578. The court erred in refusing to give charges 1, 2 and 3.—*Bush v. Glover*, 47 Ala. 167; *Williams v. The State*, 47 Ala. 659; *Parsons v. The State*, 50 Ala. 134; *Eiland v. The State*, 52 Ala. 322; *Miller v. The State*, 54 Ala. 155. Counsel discuss assignments of error, relative to evidence, but without citation of authority. •

ALEXANDER M. GARRER, Attorney-General, and THOMAS W. MARTIN, Assistant Attorney-General, for the State. The evidence as to Pitts and Price's connection with the still was of benefit to the defendant. It was competent to show that defendant bought the lot and paid for it as a circumstance tending to connect him with the business, and it was unnecessary to offer the deed.—*Griffin v. The State*, 129 Ala. 22; *Huskey v. The State*, 129 Ala. 94. The charge of the court was too favorable to the defendant, as it was only necessary for the jury to find that he aided in its operation to support a conviction.—*Kellar v. The State*, 132 Ala. 94; *Dentler v. The State*, 112 Ala. 70; *Able v. The State*, 90 Ala. 631.

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MAYFIELD, J.—The defendant was indicted for distilling without a license and contrary to law. The evidence tended to show that there was a distillery near Roanoke, operated in November and December, 1907; that corn whisky was made there; that the defendant was often seen about the still, and seemed to be superintending it before Christmas. The distillery seems to have been operated under the name of the Roanoke Distilling Company. There was some evidence tending to show that defendant bought the land upon which the distillery was located, and that he carried the keys to the buildings. It was also in evidence that defendant had stated he and others were interested in the distillery. A great deal of the evidence was to the effect that one Pitts and one Trice were doing most of the work about the still and seemed to be managing it, in November and December, 1907. There was evidence to submit the question to the jury as to whether or not the defendant was interested in the operation of this distillery, and there is ample evidence to support the verdict and judgment of conviction. This being true, the general charge in favor of the defendant was properly refused.

There was no error in allowing the witnesses to testify that Pitts and Trice were operating the distillery on certain occasions. No possible harm could come to defendant from this evidence. It affirmatively appears to have been in his favor.

There was no error in allowing the witness Gladney to testify that he had sold the land on which the distillery was located to defendant, and made him a deed thereto. The question of title and deed to this property arising wholly collaterally, as it did, it was unnecessary to produce the deed, or account for its absence, before allowing parol evidence as to the sale of the lot for this purpose.—*Garrison v. Glass*, 139 Ala. 512, 36 South. 725;

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3 Mayfield's Dig. p. 460, § 480 et seq. While owning the land upon which a distillery is unlawfully operated, and owning an interest in the distillery, standing alone, might not be sufficient to support a conviction for operating it, yet, when taken in connection with the other evidence in this case, it was clearly a proper case for the jury to pass upon the weight and sufficiency of the evidence.

There was clearly no error in that part of the oral charge of the court as to which exception was reserved. This part of the charge of the court was not, as insisted by appellant, instructing the jury that, if they believed from the evidence beyond a reasonable doubt that defendant had an interest in the distillery, they must convict him. The charge required them also to believe from the evidence, beyond a reasonable doubt, that defendant aided in operating the distillery during November and December, 1907, in Randolph county. The charge was entirely too favorable to the defendant; hence he certainly should not be allowed to complain.

The charges requested by the defendant were properly refused. One required the jury to find that defendant owned an interest in the distillery before they could convict. Another was misleading, in that it was calculated to impress the minds of the jury with the belief that before defendant could be convicted it must appear that he operated the distillery alone; that he aided in the operation, in conjunction with others, would not be sufficient. The others were, in effect, general affirmative charges, which were clearly improper under the evidence.

There being no error in the record, the judgment must be affirmed.

Affirmed.

TYSON, C. J., and SIMPSON and DENSON, JJ., concur.

[Hallmark v. The State.]

Hallmark v. The State.*Selling or Giving Away Liquor.*

(Decided Feb. 3, 1909. 48 South. 670.)

Intoxicating Liquors; Evidence; Jury Question.—Under the evidence in this case it was a question for the determination of the jury as to whether the defendant was guilty of violating the local prohibition law, and the court improperly directed the verdict.

APPEAL from St. Clair Circuit Court.

Heard before Hon. JOHN W. INZER.

From a conviction for giving away intoxicating liquor, George Hallmark appeals. Reversed and remanded.

JAMES A. EMBRY, for appellant. Under the undisputed evidence in this case the defendant was not guilty as charged.—*Campbell v. The State*, 69 Ala. 271; *Morgan v. The State*, 71 Ala. 72.

ALEXANDER M. GARBER, Attorney-General, and THOMAS W. MARTIN, Assistant Attorney-General, for the State. The effect of the defendant's conduct was to violate the law as found in Acts 1894-5, p. 242.—*Reynolds v. The State*, 73 Ala. 3; *Abel v. The State*, 90 Ala. 631; *Coker v. The State*, 91 Ala. 92.

MAYFIELD, J.—The defendant was indicted for giving away or otherwise disposing of spirituous, vinous, or malt liquor. The indictment is based on section 3 of a local prohibition act for St. Clair county (Acts 1894-95, p. 242), which inhibits the sale, giving away, or otherwise disposing of spirituous and other liquors named. Section 2 of the act prohibits the purchase of li-

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quors for one's self, or as agent for another, or ordering the same, except in certain cases; but it is unnecessary to notice this section, as the indictment did not charge an offense thereunder, and the general affirmative charge given for the state shows the trial and prosecution were under the third section of the act. The charge directs that the jury, if they find the defendant guilty will impose a fine of not less than \$50 nor more than \$500, which is the penalty provided for violations of the third section of the act; while for violations of the second section a different penalty is imposed.

The only evidence of the state was that of one Ramsey, who testified that on one occasion he went into a packing house at Steele, in St. Clair county, and there found defendant, sitting on some sacks of grain; that defendant said to him, "If you want anything there is some over there," and pointed to a bottle, which was on some sacks of grain a few feet away from defendant; that witness took a drink out of the bottle; that the bottle contained whisky; that he took only the one drink, and went out, leaving the defendant and the bottle in the packing house, exactly as he found them. The venue and time were properly proven. The state then introduced in evidence the local act for that county (Acts 1894-95, p. 242), prohibiting the sale, gift, or otherwise disposing of spirituous liquors, etc., in that county, and rested. The defendant then moved the court to exclude the state's evidence, because it was not sufficient to support a conviction. The court overruled this motion, and the defendant excepted. The defendant then testified, in his own behalf, that the testimony of the witness Ramsey was all true; that the whisky did not belong to witness; that it belonged to one Porter Casey; that he had taken a drink out of it, when he first went into the packing house; that he left the bottle of whisky in the packing

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house when he went out, and did not know what became of the bottle or the whisky remaining in it when he left it there in the house where he found it. The defendant then rested. This was all the evidence. The court, at the request of the solicitor, gave to the jury the general affirmative charge, with usual hypothesis, against the defendant, and directed the assessment of a fine, in an amount within the maximum and minimum amounts fixed by the statute.

There was no error in the court's declining to exclude the state's evidence. The jury might have inferred a gift, in violation of the statute, from this evidence; but it was clearly reversible error to give the general affirmative charge against the defendant. If he was guilty, it rested in inference from the facts proven by the state; and the defendant's evidence, if true, certainly tended to rebut the inference of guilt. We do not decide, because not necessary, that the evidence would not support a conviction by the jury, under proper instructions, yet it was certainly meager enough at best for the state for this purpose. It is wholly insufficient to support the general affirmative charge for the state. There was much more reason to support this charge in behalf of the defendant than for the state, though we do not decide that it would have been proper in behalf of the defendant. The jury might have believed that this evidence was only a part of the whole truth, and they might have been justified in inferring the other, from that before them. They might have thought that it was a mere ruse, an artifice, chicane, or finesse, on the part of these two witnesses, and, if so, a conviction might have been justified; but this is the exclusive province of the jury, and not of the court. Suppose A. and B. find C's bottle of whisky, and both take a drink out of it; is it possible that the one who found it first, and pointed it out to the

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other and suggested their taking a drink, is guilty of selling giving away, or otherwise disposing of liquor, in violation of that statute? We think not.

The judgment must be reversed, and the cause remanded.

Reversed and remanded.

TYSON, C. J., and SIMPSON and DENSON, JJ., concur.

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Robbery.

[Decided Feb. 4, 1909. 48 South. 694.]

1. *Appeal; Harmless Error; Admission of Evidence.*—If it was error to admit without proper identification pieces of slag found at the place of the robbery as the instruments used by the defendant, it was harmless as subsequent evidence was introduced fully identifying them.

2. *Robbery; Evidence.*—The prosecutor may testify that he did not consent to the taking of his money, in a prosecution for robbery.

3. *Appeal and Error; Admission of Evidence; Proper in Part.*—Where a question is asked which is improper in part, objection to it is properly overruled unless objection separates the good from the bad, so the defendant being competent to testify as to his consent or not to the taking of his money, a general objection to the question, whether defendant was willing or consented to the taking of his money was properly overruled.

APPEAL from Talladega City Court.

Heard before Hon. G. K. MILLER.

Henry Davis was convicted of robbery, and appeals. Affirmed.

The two counts in the indictment charge the taking of a suit case, two shirts, one pair of pants, one pair of overalls, a Bible, and a hair brush, stating the value of each item, the property of Clarence Dombly, from his person against his will, by violence, etc. Count 3 charges the taking of a silver dollar, of the currency of the United States, etc. The evidence tended to show that Clarence

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Domby got off the train at Childersburg and started up the railroad, looking for the home of a Mr. Crowe, and that he had a suit case, with the articles mentioned in the first two counts of the indictment in it. As he went up the road, he saw the defendant, and asked him if he knew where Mr. Crowe lived, and was told that he did not. Domby then asked defendant if he would take his valise up the road to Mr. Crowe's house for 25 cents, and the defendant replied that he would, and he took the valise, and Domby and the defendant proceeded on up the railroad, passed the brickyard of Mr. Clardy, and as they got near some woods the defendant set down the grip called the attention of Domby to a piece of iron melting or slag, and asked him if he could throw pretty well, and told Domby that he saw a rabbit in the bushes, and that witness went round the bushes to see if he could see the rabbit, when defendant struck him on the head, and he became unconscious. There was other evidence tending to corroborate the statement, and also to show how the witness got to Mr. Crow's, and as to the nature and serious character of the wound, etc. It was further shown that the suit case or grip which he was carrying was afterwards taken from the defendant, and the articles contained therein were identified. The witness Newsome testified that the place where the assault happened was in Talladega county, and that he went to the place and found blood scattered about on the ground, two pieces of iron melting or slag, and that the slag had hairs on it when he found it, and that there was blood right at it when he found it, and that there was blood right at it. The iron or slag was admitted in evidence over the objection of defendant. Subsequently the witness Domby was shown the slag, and asked if he had ever seen it before, and he identified it as the piece of iron or slag he saw in the hands of defendant on the day and at the

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time he was assaulted; but at that time it was in one piece, and in the hands of defendant, who remarked that it would make a good chop ax.

FRANCK L. VANCE, for appellant. A conviction cannot be had for robbery on evidence showing that the defendant obtained the possession of the property by fraud or artifice and retained it by force or threats of violence.—*Thomas v. The State*, 91 Ala. 34. The doctrine of error without injury is never applied in criminal cases except where it affirmatively appears that the defendant was benefited by the ruling of which he complains.—*Maxwell v. The State*, 89 Ala. 150. On this authority, the court erred in admitting Newsome's evidence as to the finding of the bludgeon. In support of the contention that the evidence was illegal and injurious to the defendant, counsel cite.—*Perry v. The State*, 91 Ala. 85; *Terry v. The State*, 118 Ala. 86; *Abernathy v. The State*, 129 Ala. 88.

ALEXANDER M. GARBER, Attorney-General, and MARION H. SIMS, Solicitor, for the State. The court did not err in admitting the piece of slag in evidence.—*Mitchell v. The State*, 94 Ala. 68; *Walker v. The State*, 97 Ala. 86; *Ezzell v. The State*, 103 Ala. 8; *Newell v. The State*, 115 Ala. 54. Counsel discuss other assignments of error, but without citation of authority.

DENSON, J.—The defendant, convicted and sentenced to be hanged for the crime of robbery, has appealed from the judgment of conviction.

The indictment contains three counts, all of which charge the crime of robbery in Code form. The first and second counts were eliminated by charges given at the defendant's request. Defendant offered no evidence,

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while that of the state makes a clear and aggravated case of robbery, as charged in the third count of the indictment.

If the court erred in its first ruling, admitting in evidence the two pieces of "iron or slag" found and picked up by witness Newsome at the place where the robbery was committed, the error was cured by subsequent evidence of identification, which was sufficient to authorize their admission in evidence, and upon which it was the province of the jury to determine whether they had formed the identical piece of "iron or slag" which Domby testified defendant picked up on the railroad, and also to determine whether it was the implement used by defendant in striking Domby.—*Mitchell's Case*, 94 Ala. 68, 10, South. 518; *Ezell's Case*, 103 Ala. 8, 15 South. 818; *Thornton's Case*, 113 Ala. 43, 21 South. 356, 59 Am. St. Rep. 97.

Whether or not it was competent for Domby to testify that he was not willing for the defendant to take his money we need not decide, as it was competent for him to testify that he did not consent for him to do so.—*Jones v. State*, 104 Ala. 30, South. 135. The question objected to called upon the witness to testify whether he was willing or consented for the defendant to take his money; and, part of the question being good, the objection was properly overruled.

The record has had that consideration which the great importance of the case entitles it to; and, having found no error therein, we hold that the judgment of conviction must be affirmed.

Affirmed.

TYSON, C. J., and SIMPSON and MAYFIELD, JJ., concur.

[Harris v. The State.]

Harris v. The State.*Larceny.*

(Decided Feb. 18, 1909. 48 South. 671.)

1. *Larceny; Affidavit; Sufficiency.*—An affidavit which charges the commission of the offense of larceny, or of any other offense, as a fact, is stronger than is required by the Constitution and statutes and is sufficient on which to issue process and found a conviction.

2. *Criminal Law; Appeal; Record.*—Where the grounds of demurrer to an affidavit is not set out in the record, this court cannot know on appeal whether the trial court erred or not in its rulings thereon.

3. *Appeal; Presumptions; Evidence.*—Where there is no bill of exceptions showing what the evidence was before the trial court, it will be presumed on appeal to have been sufficient to support the conviction.

APPEAL from Jefferson Criminal Court.

Heard before Hon. S. L. WEAVER.

From a conviction of petit larceny John Harris appeals. Affirmed.

No counsel marked for appellant.

ALEXANDER M. GARBER, Attorney-General, for the State. No demurrer is set out in the record and hence no ruling is presented on that question.—*McQueen v. The State*, 138 Ala. 63. The court properly allowed the affidavit to be amended.—*Light v. The State*, 136 Ala. 139.

ANDERSON, J.—The affidavit or complaint in this case is sufficient to support a conviction. It is true it does not aver a probable cause, etc.; but it goes further, and affirms the commission of the offense as a fact, thus being stronger than is required by the Constitution and

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the statute. The affidavit in this case is unlike the one condemned in the *Butler Case*, 130 Ala. 127, 30 South. 338. There it did not affirm the commission of the offense, etc., as facts, but merely stated that the affiant had reason to believe, etc. The grounds of demurrer not appearing of record, we cannot know that the trial court erred in its rulings thereon.

The cause was tried by the court without a jury. There is no bill of exceptions showing the evidence; hence we cannot know what it was, but must presume that it was sufficient to support the conviction.

We are unable to find any error in the record, and the judgment must be affirmed.

Affirmed.

DOWDELL, C. J., and SIMPSON, DENSON, McCLELLAN, and SAYRE, JJ., concur.

MAYFIELD, J.—(dissenting). This is an appeal from a conviction of petit larceny. The prosecution and the judgment of conviction are based solely upon an affidavit and warrant. The affidavit is as follows:

“The State of Alabama, Jefferson County. The Criminal Court of Jefferson County. Personally appeared before me, H. B. Abernathy, judge of the inferior court of Birmingham, Ala., in and for said county, Louis R. Dean, who had probable cause to believe and does believe, who being duly sworn says that John Harris and Will Baggett, whose other and further names are unknown to affiant, within twelve months before making this affidavit, in said county did feloniously take and carry away one copper tank, twenty feet of lead pipe, and fourteen brass valves, all being of the aggregate value of twenty-two and 50/100 dollars, the property of Wiley B. Burton, against the peace and dignity of the state of Alabama. Louis R. Dean.

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"Subscribed and sworn to before me this 23d day of February, 1908. H. B. Abernathy, Judge of the Inferior Court of Birmingham, Ala."

The process was made returnable to the criminal court of Jefferson county, and was tried by one of the judges of that court without a jury. The defendant demurred to the affidavit, which demurrer was overruled, as is sufficiently shown by the judgment entry; but the demurrer itself is not shown by the transcript. The affidavit was amended, by consent of the defendant, by striking out the phrase, "twenty feet of lead pipe and fourteen brass valves." One of the defendants demanded a severance, and separate trials were had, resulting in the conviction of both defendants, from which judgments of conviction they appeal.

There is no bill of exceptions, no assignment of errors, and no brief of counsel. No complaint or statement was filed by the solicitor. The judgment must rest solely upon the affidavit set out above. The affidavit is wholly insufficient for such purpose. The statute of this state prescribe the form and sufficiency of such affidavits, and the one in question does not conform to the requirements. It does not show that the complainant made affidavit or oath, as required by the statute, that he "had probable cause for believing and that he did believe that the offense charged was committed," etc. True, this phrase is in the jurat, but it is a mere gratuitous recital of the magistrate before whom the affiant appeared, and who issued the warrant, and it affirmatively appears that the affiant did not make oath to this fact. The affidavit would be in all things sufficient to charge petit larceny, but for the failure to make oath to this statutory requirement. Indeed, the affidavit literally follows the Code form for an indictment for petit larceny; hence, if it were an indictment, it would be sufficient.

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It does, in a sense, seem to be extremely technical to hold that an affidavit which follows the Code form for an indictment, is insufficient; yet it is only by virtue of the statute that either the one or the other is sufficient to support a conviction. The statutes prescribe the sufficiency of each, and do not make the form for one sufficient for the other. It appears from the statute that the sine qua non of an affidavit to authorize the issue of a warrant, and to support a conviction, is the oath of the affiant that he has probable cause for believing and does believe that a given offense has been committed. The fact that he swears the offense has been committed does not dispense with the necessity of his making oath that he has probable cause for believing and does believe it. This is just as necessary as it is to swear to the identity of the offense or of the person; nor can the recital of the fact by the magistrate, in the jurat, take the place of the oath of the affiant to the fact.

This is clearly shown by comparing the two statutes; one authorizing affidavits and warrants to support prosecutions and convictions for misdemeanors (section 6703 of the Code of 1907), and the other authorizing affidavits and warrants for prosecutions in preliminary proceedings (sections 7585-7587 of the Code). The one requires the affiant to make oath in writing that he has probable cause for believing and does believe, etc., while the latter requires the magistrate, upon complaint being made to him, whether oral or written, that in the opinion of the affiant a given offense has been committed, to examine on oath the affiant and such witnesses as he may propose and take their depositions in writing, and cause the same to be subscribed by them, and if the magistrate be satisfied from these depositions that the offense has been committed, and

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that there is reasonable ground to believe that the defendant is guilty thereof, he must issue a warrant. In the one case, for prosecutions for misdemeanors in county and inferior criminal courts, the law requires only that the complainant make affidavit that he has probable cause for believing and does believe that the offense named has been committed and that the defendant named is guilty thereof; whereas, in preliminary proceedings, it requires the magistrate to take the oath or deposition in writing of the complainant and of other witnesses named by him, and then if the magistrate is reasonably satisfied from such depositions that the offense complained of has been committed, and that there is reasonable ground to believe that the defendant is guilty thereof, he must issue the warrant.

These two kinds of process—one for instituting prosecutions, in county and other criminal courts, for misdemeanors; the other for instituting preliminary proceedings, usually as to felonies—have been confused, the one often used for the other, or parts of both proceedings combined in one, thus rendering it insufficient for either. In fact, the former is often used for the latter, without any authority of law; and this is a case where there is an apparent attempt to use a part of both for the former, but it is wholly insufficient, and cannot support a conviction.—Section 6703, Code; *Butler v. State*, 130 Ala. 127, 30 South. 338; *Miles' Case*, 94 Ala. 106, 11 South. 403; *Johnson's Case*, 82 Ala. 29, 2 South. 466.

[Johnson v. The State.]

Johnson v. The State.*Grand Larceny.*

(Decided Feb. 11, 1909. 48 South. 702.)

1. *Evidence; Judicial Notice; Clearing House Certificate; Value.*—Courts will not take judicial notice of a particular clearing house or of the nature of the clearing house certificate issued by it.

2. *Larceny; Indictment; Nature of Property.*—Since the provisions of the Code of 1907, Section 2, that the words, personal property, shall include money, evidences of debt, etc., an indictment alleging the taking of clearing house certificates, the personal property of another, sufficiently alleges the taking of property that is the subject of larceny, in the absence of evidence showing the nature of such certificate.

3. *Same; Description of Property.*—An indictment charging the taking and carrying away one bill of the denomination of twenty dollars, lawful money of the United States of America, and four clearing house certificates of the denomination of five dollars each, issued by the clearing house association of the aggregate value of twenty dollars, sufficiently describes the property taken.

APPEAL from Montgomery City Court.

Heard before Hon. W. H. THOMAS.

John Johnson was convicted of grand larceny and he appeals. Affirmed.

JOHN W. A. SANFORD, JR., for appellant. No brief came to the Reporter.

ALEXANDER M. GABBER, Attorney General, and THOMAS W. MARTIN, Assistant Attorney General, for the State. Clearing house certificates possess an intrinsic value.—5 Cyc. 613, note 48. The description was sufficient.—*Grant v. The State*, 55 Ala. 208; *Carden v. The State*, 89 Ala. 130. Clearing house certificates are legal money.—*Noble v. The State*, 59 Ala. 81.

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McCLELLAN, J.—The indictment charged that the appellant “feloniously took and carried away one bill, of the denomination of twenty dollars, lawful currency of the United States of America, and four clearing house certificates, of the denomination of five dollars each, issued by the Clearing House Association of Montgomery, Alabama, of the value of twenty dollars, the personal property” of one Garner. The demurrer takes the objection, in substance: First, that the certificates mentioned cannot be the subject of larceny under our statutes; second, that, no authority for their issuance being averred, they were without legal existence and without intrinsic value; and, third, these alleged subjects of the alleged larceny are not sufficiently described. The appeal is on the record proper, without bill of exceptions.

While it may be that judicial knowledge of the general nature and purpose of a clearing house could, upon proper occasion, be indulged, we know of no reason, and have been unable to find any authority, to justify the assumption of judicial knowledge of the particular institution, and the certificates mentioned in the indictment.—16 Cyc. pp. 878-880, and notes. Since the indictment avers that such certificates were personal property, and were of the value of \$20, the issues were, of course, of fact, and in the absence of judicial knowledge, as stated, neither the court below, nor this, could pronounce the result asserted by some grounds of the demurrer. Our statute (Code 1907, § 7324) condemns as grand larceny the felonious taking, etc., of any personal property of the value of \$25. The words “personal property” include “money, goods, chattels, things in action and evidences of debt, deeds and conveyances.”—Code 1907, § 2. It may very well have been assumed by the court below, for the purpose of ruling on the de-

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murrer, that the certificates described, in number, denomination, and source of issue, were evidences of debt, promises to pay. The description was sufficient.—*Du-bois v. State*, 50 Ala. 139; 25 Cyc. pp. 77, 78, and authorities in notes.

There is no error in the record, and the judgment must be affirmed.

Affirmed.

DOWDELL, C. J., and ANDERSON and MAYFIELD, JJ., concur.

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Larceny.

(Decided Feb. 11, 1909. 48 South. 795.)

1. *Landlord and Tenant; Renting on Shares; Relation.*—Where one furnishes the land, teams, feed for the teams and the farming implements, and another furnishes the labor to make the crop with an agreement to divide, the relation of employer and employe exists between them.

2. *Larceny; Property Subject to Larceny; Crop After Removal From Land.*—If one severs crops from the land, and by a subsequent act takes it or removes it with the intent to steal, such act constitutes larceny, although while attached to the land the crop is not the subject of larceny.

3. *Same; Instructions.*—A charge asserting that before the jury could convict they must be satisfied beyond a reasonable doubt that the corn was severed from the freehold, and if they believe that the defendant severed the corn, and then carried it away, they should acquit, does not hypothesize the fact that larceny could have been committed by a separate act of the accused in taking the corn after he had severed it from the realty, and was properly refused for that reason; especially where the evidence tended to show the severing by one act and the taking by a subsequent act.

APPEAL from Pike Law Court.

Heard before Hon. A. H. OWENS.

Will Adams was convicted of larceny and he appeals.
Affirmed.

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In his oral charge to the jury the court said that if the defendant gathered the corn, or had it gathered, out of the fields of one E. J. Pilley, as testified about, and put it in the Babcock house, where he then lived, and afterwards had it moved to the place where he moved to from there, with the intent to steal it, and that this was in Pike county and within 12 months before the commencement of this prosecution, and they believed all this beyond a reasonable doubt, the defendant would be guilty, and it would be their duty to so find. Charge 4 is as follows: "Before the jury can convict the defendant, they must believe beyond a reasonable doubt that the corn was severed from the freehold, before they can convict the defendant. If the jury believe that the defendant severed the corn, and then carried it off, then the defendant cannot be convicted of larceny."

BOYKIN OWENS, for appellant. The Pike law court is a court of limited jurisdiction, its jurisdiction in criminal matters being limited to misdemeanors only. The evidence showed the commission of a felony, if any offense was committed, and hence the court was without jurisdiction to hear and determine this cause.

ALEXANDER M. GARBBER, Attorney General, for the State. Counsel insists that the oral charge of the court was correct and that the court properly refused the defendant's requested charges, and cites in support thereof.—*Turner v. The State*, 97 Ala. 27; *Harrison v. The State*, 24 Ala. 67.

McCLELLAN, J.—The indictment charged petit larceny of seven bushels of corn. The defendant engaged, with one Piley, to make a crop on the latter's land; he to furnish the land, team, feed for the team, and the farming implements, and the defendant to furnish the

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labor—the crop to be divided. This arrangement created the relation of employer and employe, and not that of tenants in common in the crop cultivated and raised. Code 1907, § 4743.

There was proof tending to show that the defendant gathered the corn, then in growth, and carried it to the Babcock house, to which he had previously removed from the place whereon the crop was growing, and that later, this corn was hauled to another place, to which defendant moved from the Babcock place. Notwithstanding originally the corn was of the realty, and not subject to larceny, as distinguished from the felonious taking of a part of an outstanding crop, it was open to the jury to conclude, from all the evidence, that subsequent to the severance of the corn from the realty, by a separate act, the defendant took it with the intent to steal.—*Johnson v. State*, 100 Ala. 35, 14 South. 98. Accordingly the oral charge of the court was not erroneous.

The defendant requested special charges 1, 2, 3, and 4, which the court refused. The first was general charge, and the second and third predicated an acquittal upon the idea that the defendant and the owner of the land were tenants in common in the crop. As before indicated, this relation did not exist in the premises. The affirmative charge, of course, could not be given. The fourth charge was properly refused, because it pretermits, in hypothesis, the fact, suggested by some tendencies of the evidence, that by a separate act, after severance from the realty, larceny may have been committed.

There is no error in the record, and the judgment is affirmed.

Affirmed.

DOWDELL, C. J., and ANDERSON and MAYFIELD, JJ.,
concur.

[Birmingham Water Works Co. v. The State.]

Birmingham Water Works Co. v. The State.

Obstructing Public Road.

(Decided Feb. 4, 1909. 48 South. 658.)

1. *Fees and Cost; Solicitor's Fees; Misdemeanors.*—Section 5388, while making the willful obstruction of a public road a misdemeanor, affixes no penalty, and is within the class of misdemeanors not otherwise provided for; hence, the solicitor's fee on such conviction is \$7.50, notwithstanding the provisions of section 4561, Code 1896, provides a solicitor's fee of \$50 for securing a conviction of any corporation for a violation of any of the laws of the state.

2. *Constitutional Law; Equality; Penalty.*—Section 4561, Code 1896, fixing a \$50 solicitor's fee for securing convictions against a corporation for the violation of any of the laws of the state, is invalid as an unjust discrimination against corporations, except as to offenses peculiar to them; especially in view of the fact that a fee for solicitors of \$7.50 is fixed for convictions of other misdemeanors by individuals not otherwise provided for.

3. *Same; Equality; Classification.*—A state may classify offenses according to its discretion; but such classification must rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without a just basis.

APPEAL from Shelby County Court.

Heard before Hon. A. P. LONGSHORE.

The Birmingham Water Works Company was convicted of willfully obstructing the public road. Among other penalties affixed was a solicitor's fee of \$50. The corporation entered a motion to retax cost and fix the solicitor's fee at \$7.50. From a judgment denying this motion, it appeals. Reversed and remanded.

LONDON & FITTS, for appellant. The right to arbitrarily discriminate against the corporation does not exist.—*Goff, etc., Ry. Co. v. Ellis*, 165 U. S. 150; *Cotting v. Kansas City Stock Yards*, 183 U. S. 79; *R. R. v. Morris*, 65 Ala. 193; *Smith v. L. & N.*, 75 Ala. 449; *Carter*

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Bros. v. Coleman, 84 Ala. 256; *Randolph v. B. & P. S. Co.*, 106 Ala. 511. It follows from these authorities that the fee of \$7.50 is the one contemplated by the legislature under section 4561, Code 1896 to be taxed for a conviction of the offense here charged although defendant is a corporation. The solicitor's fee is a part of the punishment and to exact a larger fee against a corporation than against an individual would be a discrimination.—*Caldwell v. The State*, 55 Ala. 133; *Barbour v. Connely*, 113 U. S. 27; H. Cyc. 1076.

ALEXANDER M. GARBBER, Attorney-General, for the State.

SIMPSON, J.—The appellant was convicted of the misdemeanor of obstructing a public road. The appeal is from the decision of the court overruling a motion to retax the costs.

The costs against the corporation were taxed at \$50, under section 4561 of the Code of 1896, which provided for a solicitor's fee of \$50 "for securing the conviction of any corporation for violating any law of the state." Another clause of the same section provided for a solicitor's fee of \$7.50 "for each conviction of a misdemeanor, not otherwise provided for," and appellant insists that said section 4561 is unconstitutional, in that it places a heavier penalty on corporations than on individuals convicted of a misdemeanor.

Section 5388 of the Code of 1896 made the willful obstruction of a public road a misdemeanor, but affixed no penalty; and as this offense is "not otherwise provided for," the solicitor's fee is only \$7.50. The solicitor's fee which is taxed against a defendant is a part of the penalty which he pays. Corporations are persons, within the meaning of the Constitution.—*Santa Clara*

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Co. v. So. Pac. R. R., 118 U. S. 394, 6 Sup. Ct. 1132, 30 L. Ed. 118; *Mo. Pac. Ry. v. Mackey*, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107; *Gulf, etc., Ry. Ellis*, 165 U. S. 150, 154, 17 Sup. Ct. 255, 41 L. Ed. 666.

It needs no argument to show that, if a greater penalty is inflicted upon one person than upon another for the commission of the same offense, such person so discriminated against, is denied that equal protection of the laws, which is the spirit of our Constitutions, state and federal, and which has been specially formulated in the fourteenth amendment to the Constitution of the United States. It is true that the state may classify offenses according to their nature, and affix penalties according to its discretion; but the Supreme Court of the United States has said that "classification cannot be made arbitrarily," but must "rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily, and without a just basis."—*Gulf, etc., Ry. v. Ellis*, 165 U. S. 150 155, 17 Sup. Ct. 255, 257, 41 L. Ed. 666.

Our own court has held that a statute which authorized the taxing of an attorney's fee against railroads in stock claim cases was unconstitutional; the court saying: "A law which would require all farmers who raise cotton to pay such a fee, in cases where cotton was the subject-matter of litigation and the owners of this staple were parties to the suit, would be so discriminating in its nature as to appear manifestly unconstitutional; and one which should confine the tax alone to physicians, or merchants, or ministers of the gospel, would be glaring in its obnoxious repugnancy to these cardinal principles of free government which are found incorporated, perhaps, in the Bill of Rights of every state Constitution of the various commonwealths of the American govern-

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ment.”—*S. & N. Ala. R. R. v. Morris*, 65 Ala. 193, 200. Again, an act which gave to the parent a right of action against “an incorporated company or private association of persons” for death of a minor child was held unconstitutional, as discriminating between said corporations or associations and individuals; the court (referring to the fourteenth amendment to the Constitution of the United States and to certain sections in our own Constitution) saying: “The sum of these provisions is that no burden can be imposed on one class of persons, natural or artificial, which is not, in like conditions, imposed on all other classes.”—*Smith v. L. & N. R. R.*, 75 Ala. 449, 451. It was also held that an act which inflicted a penalty upon an individual banker for discounting paper at a usurious rate of interest, and did not inflict the same penalty on a corporation for the same offense, was unconstitutional.—*Carter Bros. & Co. v. Coleman et al.*, 84 Ala. 256, 259, 4 South. 151.

It is suggested by the Attorney General that this classification is justifiable, because a corporation cannot be confined in prison or sentenced to hard labor for the county. We do not think this is sufficient reason for the discrimination. The act requires the \$50 to be taxed in all cases, however trivial, and, besides, if it should be desired to imprison any one (which is seldom the case in this class of cases), the officer or agent who places the obstruction is liable to prosecution. To construe the act as applicable to all cases in which a corporation is convicted would render it unconstitutional. Hence, we hold that it is applicable only to the class of offenses peculiar to corporations.

The judgment of the court is reversed, and the cause remanded.

Reversed and remanded.

TYSON, C. J., and DENSON and MAYFIELD, JJ., concur.

[State v. Spurlock.]

State v. Spurlock.*Habeas Corpus.*

(Decided Feb. 4, 1909. 48 South. 849.)

1. *Statutes; Local and Special; Repeal.*—Section 10, Code 1907, applies only to repeals by implication, and therefore, is not in conflict with sections 6733, Code 1907, which section repeals all local or special laws in conflict with it, relative to the fixing and defining the jurisdiction of justices of the peace in criminal matters.

2. *Justices of the Peace; Criminal Jurisdiction.*—The criminal jurisdiction of justices of the peace is of legislative rather than constitutional creation, and the legislature may withdraw this jurisdiction whenever deemed expedient, so that Acts 1900-01, p. 794, is a valid enactment, although it withdraws criminal jurisdiction from the justice of the peace of Mobile; and such act is not repealed by section 6733, Code 1907, as that section applies only to justices of the peace having criminal jurisdiction.

APPEAL from Mobile Circuit Court.

Heard before Hon. SAMUEL B. BROWNE.

William Spurlock was convicted and fined by a justice of the peace of the city of Mobile, and brings habeas corpus for his discharge. From an order granting the discharge the state appeals. Affirmed.

ALEXANDER M. GARBER, Attorney General, and THOMAS W. MARTIN, Assistant Attorney General, for the State. The Act approved Feb. 1, 1901, (Acts 1900-01, p. 794) deprived justices of the peace of Mobile county of their criminal jurisdiction and invests it in the inferior court. This Act was repealed by the Code of 1907.—Section 10, Code 1907; Section 6733, Code 1907; 26 A. & E. Ency of Law, 741; *Roberts v. Pippin*, 75 Ala. 103; *Parsons v. Hubbard*, 64 Ala. 201; *Board of Revenue v. Barbour*, 53 Ala. 593.

No counsel marked for appellee.

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ANDERSON, J.—Section 6733 of the Code of 1907 fixes and defines the jurisdiction of justices of the peace, and concludes as follows: “*And all local or special laws in conflict herewith are expressly repealed.*” (Italics supplied.) While the repealing clause of the section in question does no more than to repeal laws in conflict therewith, and which would be the result, regardless of the insertion of said clause, but for the proviso of section 10 of the Code of 1907 in reference to local laws on this subject (*Ogbourne v. Ogbourne*, 60 Ala. 616; *District of Columbia v. Sisters of Visitation*, 15 App. D. C. 308), yet it was a legislative declaration of the effect of the law, and evinces an intent to repeal all local or special laws in conflict therewith, regardless of section 10 of the Code. Indeed, the insertion of such a clause in a section of the Code is unusual, and it was evidently put there to emphasize an intention to repeal all laws in conflict therewith, regardless of section 10. Conceding, therefore, that section 10, notwithstanding it appears in the first chapter of the Code, is the last legislative expression, as it applies to the whole Code and was inserted to explain and qualify same, we think that so much thereof, providing against the repeal of local and special laws, upon the subjects therein enumerated, applies to repeals by mere implication—not to sections of the Code containing an express declaration of the repeal of special and local laws, or to those that are so worded as to clearly indicate a legislative intent to repeal same. We are of the opinion that section 10 has no application to section 6733, and that this last section repeals all laws in conflict with same. To hold that section 10 prevented the repeal of all local laws in conflict therewith would in effect defeat the very purpose and intention of this law, as there are few counties in the state where the jurisdiction of justices of the peace is uniform,

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and the section in question was inserted in the Code to fix and make uniform the jurisdiction of justices then exercising criminal jurisdiction under the law.

The question then is: Does section 6733, by fixing and making uniform the jurisdiction of justices of the peace, repeal Acts 1900-01, p. 794, which withdrew from justices in Mobile all criminal jurisdiction? If there is a conflict, it does; but, if there is a field of operation for both laws, it does not. "In order to harmonize legislative acts, courts are required to adopt, if necessary, rules of general and liberal construction. If it be possible to reconcile the two statutes, so as to permit both to stand without violating sound rules of construction, this will be done. The court will not ordinarily declare a prior act to be repealed by a subsequent one, in the absence of express words of repeal, unless the provisions of the two are directly repugnant, or, as frequently expressed, irreconcilably inconsistent."—*Roberts v. Pippin*, 75 Ala. 103; *Parker v. Hubbard*, 64 Ala. 207; *Board of Revenue v. Barber*, 53 Ala. 593. Section 6733 does not say all justices of the peace, and, when taken in connection with our statutory and organic laws on this subject, can be construed, without doing violence to the letter, as applying only to those justices of the peace who, at the time of its enactment, were clothed with some criminal jurisdiction, and not to those who had been shorn of all jurisdiction in criminal cases.

A justice of the peace is a constitutional officer, and is given by the terms of the Constitution certain civil jurisdiction; but the right to exercise criminal jurisdiction is of statutory creation. This the Legislature can give, and this the Legislature can withdraw when previously given. The present Constitution, like its predecessor, left the power to confer criminal jurisdiction on justices of the peace, but, unlike its predecessors, gives

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the Legislature a discretion as to justices of the peace, or inferior courts, in lieu of same, in cities and incorporated towns having more than 1,500 inhabitants. Section 168, Constitution of 1901. The Legislature, recognizing its constitutional right to do so, has in several instances taken from justices of the peace all criminal jurisdiction, and has since the adoption of the present Constitution established inferior courts in lieu of justices of the peace in certain cities and towns with more than 1,500 inhabitants. Consequently the present Code was compiled, rewritten in part, and adopted at a time when we had what may be termed two separate and distinct classes of justices of the peace—one class with civil jurisdiction only, and the other with both civil and criminal jurisdiction. So, too, is it a matter of judicial knowledge that the acts previous to the present Constitution contained local laws conferring different jurisdiction and fees upon justices of the peace in the various counties of the state thus in effect destroying all uniformity as to jurisdiction or compensation. Therefore the framers of the present Constitution, recognizing this condition, attempted to obviate such an inharmonious state of affairs by inserting in the Constitution of 1901 subdivision 21 of section 104, prohibiting the increase of the jurisdiction or fees of justices of the peace by any law. And it is a reasonable assumption, that the code commissioner prepared and inserted section 6733 for the purpose of defining and making uniform the jurisdiction of the justices of the peace then exercising criminal jurisdiction and intended to repeal the various local laws conferring different jurisdiction in many localities, but did not intend to give criminal jurisdiction where none existed. We are of opinion that the act of 1901, withdrawing criminal jurisdiction from justices of the peace in Mobile, was not repealed by

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section 6733, as there is no conflict; and, as the petitioner was committed by an officer who had no jurisdiction to do so, the circuit judge correctly ordered his discharge, and his order in so doing is affirmed.

Affirmed.

TYSON, C. J., and DOWDELL, SIMPSON, DENSON. and MAYFIELD, JJ., concur.

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Carrying Pistol Less than 24 Inches Long.

(Decided Feb. 5, 1909. 48 South. 672.)

Statutes; Enactment; Validity.—General Acts, Special Session, 1907, page 80, is void because in its passage through the Senate it was reported from a committee other than the one to which it was referred, and was enacted in violation of section 62, Constitution 1901.

APPEAL from Bessemer City Court.

Heard before Hon. WILLIAM JACKSON.

From a conviction for having possession of a pistol less than 24 inches in length, Lon Tyler appeals. Reversed and rendered.

PINKNEY SCOTT, and R. H. FRIES, for appellant. The Act under which defendant was convicted violates section 62 of the Constitution of 1908.—*State v. Reed*, 1 Ala. 612. The court erred in sustaining the demurrers to pleas 1 and 2.—Authorities *supra*. Counsel discuss errors relative to evidence, but without citation of authority.

ALEXANDER M. GARBER, Attorney General, and THOMAS W. MARTIN, Assistant Attorney General, for the

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State. The court did not err in overruling demurrers to the indictment.—*State v. Reed*, 1 Ala. 612. An officer has no authority to carry a pistol concealed.—*Reach v. The State*, 94 Ala. 113. The court properly gave the affirmative charge.—*Hyde v. The State*, 46 South. 489; *Frieburg v. The State*, 94 Ala. 91; 5 A. & E. Ency of Law, 745.

MCCLELLAN, J.—On rehearing counsel for appellant for the first time brought to our attention and urged in brief the objection that the act approved November 23, 1907 (Gen. Acts, Sp. Sess. 1907, p. 80), to prohibit the sale or barter or having possession of small deadly weapons of a described character, was not validly enacted, for the reason that the requirements of section 62 of the Constitution of 1901 were not complied with in the passage of the bill through the Senate. Section 62 provides: "No bill shall become a law until it shall have been referred to a standing committee of each house, acted upon by such committee in session, and returned therefrom, which facts shall affirmatively appear upon the journal of each house."

An inspection of the original journal of the Senate shows that this bill (House Bill 37) was regularly referred to the committee on revision of laws and, latterly, that the committee on local legislation reported the same back to the Senate. The status then is that a bill referred to one standing committee of the body is reported from another standing committee to which it does not affirmatively appear, from the Senate Journal, to have been referred. This was a patent failure of observance of section 62; and the consequence necessarily is that the bill was not constitutionally passed, and never became a law.—*Walker v. City Council of Montgomery*, 139 Ala. 468, 36 South. 23.

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Accordingly, the judgment is reversed, and one will be here entered discharging the defendant, appellant.

TYSON, C. J., and DOWDELL, SIMPSON, ANDERSON, DENSON, and MAYFIELD, JJ., concur.

Templin v. The State.

Trespass After Warning.

(Decided Feb. 9, 1909. Rehearing denied April 6, 1909.
48 South. 1027.)

1. *Trespass; After Warning; Person Giving Warning.*—Where the warning is given by one in his capacity as an officer of the law, and not as the agent of the owner, the person so warned cannot be convicted of trespass after warning, although the person giving the warning was the agent of the owner with authority to warn all trespassers.

2. *Indictment and Information; Conjunctive Averment; Proof.*—Where two offenses are charged conjunctively in an indictment or affidavit, proof must be made of both charges in order to sustain a conviction.

3. *Same; Joinder of Offenses.*—An affidavit charging a trespass after warning, and a refusal to leave the premises after being warned to do so charges two offenses conjunctively.

4. *Criminal Law; Disposition of Cause.*—Where the evidence shows conclusively that there can be no conviction for the offense charged, a judgment of conviction will be reversed and the defendant discharged.

APPEAL from Bibb County Court.

Heard before Hon. W. L. PRATT.

J. C. Templin was convicted of trespassing after warning, and he appeals. Reversed, and accused discharged.

The affidavit was in the following language: "Personally appeared before me, G. G. Pate, a justice of the peace in and for said county, C. C. Peyton, who being duly sworn, says on oath that J. C. Templin, within 12 months before making this affidavit, in said county, did trespass after warning, and did refuse to leave the prem-

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ises of Red Feather Coal Company, after being warned to do so, against the peace and dignity of the state of Alabama," etc. The evidence tended to show that the defendant was on a road which led from the main public road near Lucile to the post office, commissary, and houses occupied by the employes of the Red Feather Coal Company, when he was warned to get off the property. The warning came from Peyton, whose testimony tended to show that it was given in his capacity as an officer of the law, and not as an agent or employe of the Red Feather Coal Company.

FRANK S. WHITE & SONS, and J. B. GARBER, for appellant. The affidavit upon which appellant was arrested and tried was an absolute nullity.—Section 7827, Code 1907.—*Goldsmith's Case*, 86 Ala. 55. Defendant has a right to demand the nature and cause of the accusation so as to enable him to identify the offense with which he was charged in the affidavit.—*Sandy v. The State*, 60 Ala. 18; *Emmons v. The State*, 87 Ala. 12; *Withers v. The State*, 117 Ala. 89; *Wright v. The State*, 136 Ala. 139. The affidavit should have averred the facts showing that the company was a corporation.—*Scymour v. Thomas-Harrow Co.*, 81 Ala. 252; *People v. Schwarz*, 32 Cal. 160; 63 Ill. 453; 73 Ala. 482. The time should have been alleged.—*Musgrove v. The State*, 139 Ala. 137; *Anderson v. The State*, 130 Ala. 126. See generally.—71 Ala. 344; 55 Ala. 182; 94 Ala. 106; 89 Ala. 43; 104 Ala. 160. Perry should not have been allowed to state whether the road was a public road.—*McDade v. The State*, 95 Ala. 30; 9 A. & E. Ency of Law, 362. The evidence did not support the affidavit and should have been excluded on motion.

ALEXANDER M. GARBER, Attorney General, and THOMAS W. MARTIN, Assistant Attorney General, and W. W.

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LAVENDER, Solicitor, for the State. If there was any possible error in allowing Perry to testify concerning the road it was error without injury.—*Norris v. The State*, 39 South. 608; *Thompson v. The State*, 122 Ala. 12; *Sanders v. The State*, 131 Ala. 1; *Murphey v. The State*, 118 Ala. 137. There is not objection to the question that it was leading.—*Ray v. The State*, 126 Ala. 9. The record shows that the answer was favorable to the defendant, and he cannot complain.—132 Ala. 17; 98 Ala. 590; 75 Ala. 31. The affidavit was sufficient.—*Randle v. The State*, 46 South. 759. Under the facts in this case as shown by the record, the demurrers to the affidavit were waived.—*Haardt v. Sharpton*, 124 Ala. 638. The complaint sufficiently charged the offense and the sufficiency of the evidence was for the court.—*Cross v. The State*, 147 Ala. 125; *Wright v. The State*, 136 Ala. 139; *Wilson v. The State*, 87 Ala. 117. There is nothing in the act creating the court to authorize this court to review the findings of the trial court, unless that authority is given by section 5361 of the Code.—*Lloyd v. Oates*, 143 Ala. 237; Acts 1894-5, p. 112. Judgment should be affirmed even if the action of the court can be reviewed.—*Holmes v. The State*, 39 South. 569.

MAYFIELD, J.—On further examination of this record we find no evidence to support the judgment of conviction. The undisputed evidence shows that the warning given was by Peyton as an officer of the law, and not, as the agent of the owner of the premises. While it is shown that Peyton was the agent of the company, the owner of the premises, and had authority to warn off trespassers, yet he testified that he warned defendant as an officer of the law, and not as the agent of the owner.

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The affidavit or complaint charged that defendant trespassed after warning, and refused to leave the premises after being warned. It charged two offenses conjunctively, and this required proof of both. There was no attempt to prove the first—in facts, all the evidence indisputably disproved it; nor did the evidence prove any offense, if properly charged. The evidence conclusively showing that there could be no conviction of the offense charged, the judgment is reversed, and judgment will be here rendered discharging the defendant.

Reversed and rendered.

DOWDELL, C. J., and SIMPSON and DENSON, JJ., concur.

MAYFIELD, J.—The writer is of the opinion, though the other justices do not agree with him in this, that the affidavit was insufficient to support a conviction, in that there was no oath or affirmation to support it, that affiant had probable cause for believing, and did believe, that an offense was committed, and that defendant was guilty thereof, as required by the statute (Code 1907, § 6703), and that both the arrest and the prosecution were in palpable violation of sections 5, 7, and 8 of the state Constitution of 1901, which read as follows:

“Sec. 5. That the people shall be secure in their persons, houses, papers and possessions from unreasonable seizure or searches, and that no warrants shall issue to search any place or to seize any person or thing without probable cause, supported by oath or affirmation.”

“Sec. 7. That no person shall be accused or arrested, or detained, except in cases ascertained by law, and according to the form which the same has prescribed; and no person shall be punished but by virtue of a law established and promulgated prior to the offense and legally applied.

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"Sec. 8. That no person shall, for any indictable offense, be proceeded against criminally, by information, except in cases arising in the militia and volunteer forces when in actual service, or when assembled under arms as a military organization, or, by leave of the court, for malfeasance, misdemeanor, extortion and oppression in office, otherwise than is provided in the Constitution; provided, that in cases of misdemeanor, the Legislature may by law dispense with a grand jury and authorize such prosecutions and proceedings before justices of the peace or such other inferior courts as may be by law established."

The mere statement, in the affidavit, that the offense was committed and the defendant was guilty, is not a compliance with the statute authorizing prosecutions to be commenced by such affidavit, nor a compliance with the Constitution. The Constitution requiring that "no warrant shall issue * * * without probable cause, supported by oath," etc., and that arrests and prosecutions must be according to forms prescribed by law, and the statute having prescribed what is sufficient to support the warrant and prosecution, in lieu of an indictment (which would otherwise be necessary), and having not only done this, but given the form thereof, this court cannot say that a different form from that prescribed by law is as good as, or better than, the only one prescribed by the Legislature. If the Legislature had done as to the affidavits, as it has as to indictments, then the affidavit in question would be sufficient; but it has not done so. It has not said that this form prescribed, or some other like it, will be sufficient; but it has said that the one given or prescribed is sufficient. Courts can only construe, expound, and apply the statutes. They cannot reform them, nor make others, and say these are the law, because better than the ones the

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Legislature made. The form that the "law" (the Constitution and the statute) has prescribed for this arrest and this prosecution, and which the Constitution directs and demands, provides that the affiant shall make oath that he (affiant) has probable cause for believing, and does believe, what he swears. It also requires the judge, court, or justice issuing the process, thus starting the criminal machinery of the state agoing against the citizen, to have such probable cause for believing that the offense charged in the affidavit was committed.

This record shows that there was not the semblance of an attempt to comply with this form prescribed by law, but that an entirely different one was adopted—one which the court must, in my humble opinion, say is not the one prescribed, but a better one. The court has no more power or right to make a better one, than it has to make a worse one, than that "prescribed by law." This case illustrates, as clearly and strongly as it is possible so to do, the evils of allowing prosecutions to be begun and tried in such manner. Here is a man traveling upon the highway, when he is suddenly hailed and halted, and told by another he is a trespasser—a law breaker—and peremptorily ordered to then and there turn his wagon around and leave the road. He refuses so to do, until he can proceed a few yards and deliver some food and vegetables to customers who had ordered same—promising to thereupon leave at the bidding of this lawmaker and executioner; but this small request is denied the citizen, and he is then and there arrested, deprived of his liberty, and carried before a magistrate, and this lawmaker and executioner swears he has committed two offenses. Upon this a warrant is issued, returnable to the court, and the citizen is put upon trial; and on the evidence of the lawmaker and executioner, and all the other witnesses, he is convicted and sentenc-

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ed. He appeals to this court; and the cause must be reversed and rendered, because the evidence, which is undisputed, shows the commission of no offense.

I deem it proper to say here that what is stated above is not intended as a criticism of the affiant and officer who made this arrest and affidavit, because it conclusively appears that he testified truly, fully, and freely as to all things, and did only what he thought was his duty, but that the wrong is in the practice, which requires a man not learned in the law to make, construe, and execute the law, without any kind of a quasi judicial determination as to whether any offense at all has been committed.

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Using Abusive Language, and Violating the Anti-Boycott Law.

(Decided Feb. 4, 1900. 48 South. 851.)

1. *Indictment and Information; Misjoinder of Offenses; Demurrer.*—Demurrer is not the proper method for taking objection for a misjoinder of offenses which are misdemeanors, as misdemeanors not belonging to the same family of crime may be joined in an indictment; however, the rule is different as to felony.

2. *Criminal Law; Double Conviction for Single Act Violating Too Statutes.*—There can be but one conviction for a single act although it may violate two penal statutes, so that an indictment charging both a violation of the abusive language statute and of the use of threats against the anti-boycott act, both growing out of a single act, will not support a verdict that finds the defendant guilty as charged in the indictment, and further finds the defendant \$133, etc., since under such verdict, the fine must be referred to both offenses; the proper practice in such a case, is to instruct the jury that if convinced of defendant's guilt of one or both of the offenses the verdict should be guilty of only one of the offenses.

3. *Indictment and Information; Election.*—Although the counts of an indictment may charge and the proof may show the violation of two or more misdemeanor statutes, yet if the violation was caused by a single criminal act no occasion for an election by the state is

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presented, since the purpose of an election is the protection of the defendant from prosecution for two or more like offenses under one count.

4. *Same; Sufficiency; Language of Statute.*—An indictment which follows the language of Acts 1903, p. 282, sec. 4, with the words, "at any place, he or she sees fit" omitted it is a sufficient indictment under such Act, since the words, omitted are mere surplusage.

5. *Conspiracy; Boycott; Occupation.*—To authorize a conviction under the anti-boycott law, Acts 1903, p. 282, it is necessary to show that the person against whom the act or conduct complained of were directed was engaged in a lawful occupation or intended to engage in such an occupation, and that the acts and conduct complained of had reference to the prevention of such an engagement or the pursuit of such an occupation.

APPEAL from Mobile City Court.

Heard before Hon. O. J. SEMMES.

Lawrence Burt was convicted under an indictment charging the use of insulting, etc., language in the presence of females, and violation of the anti-boycott act (Laws 1903, p. 281), and appeals. Reversed and remanded.

The first count in the indictment charges the use of insulting, etc., language in the presence of females. The other counts are as follows (omitting the formal charging part): (2) Lawrence Burt used threats to prevent Lilly LeBeau from engaging in a lawful occupation. (3) Lawrence Burt used threats to prevent Lilly Le Beau from engaging in the lawful occupation of teaching pupils to use the keyboard of a linotype machine. (4) Lawrence Burt used threats to prevent Lilly Le Beau from engaging in the lawful occupation of teaching pupils to use the keyboard of the linotype machine—said threats consisting and stating that he or the Typographical Union would boycott her; that he would see that everybody that belonged to any union would work against her, and that they would ruin her business inside of a month; that the union was strong, and would crush her, no matter what town or city she should move to; that they would follow her and keep her down.

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Demurrers were interposed: (1) Because there was a misjoinder of offenses in the indictment, the demurrers specifying the offenses therein charged. (2) Because said count does not state in what said alleged threats consisted. It does not state the nature of the lawful occupation mentioned. It does not allege that said Lilly Le Beau was prevented from engaging in a lawful occupation by reason or virtue of said alleged threats. Said count does not allege that said Lilly Le Beau saw fit to engage in any lawful occupation at any place. It does not allege at what place said Lilly Le Beau saw fit to engage in a lawful occupation. Because section 4 of the act of Legislature of Alabama, approved September 26, 1903 (Gen. Acts 1903, p. 282) is unconstitutional, in that the subject of section 4 in said act is not clearly expressed in the title, and count 2 of the indictment is drawn under said section. The same is unconstitutional in that it contains more than one subject. The same demurrers were interposed to count 3. Demurrers to count 4 were interposed as follows: The said count is ambiguous, in that it does not allege with certainty whether said alleged threats consisted in stating that he, the defendant, would boycott her, or whether the Typographical Union would boycott her. It is not alleged that the defendant made the statement or statements set forth in said count. Because the statement or statements set forth in count 4 do not constitute a threat or threats, within the meaning of section 4 of said act—together with the other grounds of demurrer interposed to the other counts.

BOYLES & KOHN, for appellant. The court below erred in overruling defendant's demurrer to the whole indictment.—*Norvelle v. The State*, 50 Ala. 174; *Quinn v. The State*, 49 Ala. 353; *Wooster v. The State*, 55 Ala.

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217; *Swanson v. The State*, 120 Ala. 376. The demurrer to the 2nd count of the indictment should have been sustained.—Section 7136, Code 1907; *Eubanks v. The State*, 17 Ala. 181; *Beasley v. The State*, 18 Ala. 540; *Pettibone v. The State*, 19 Ala. 586; *Skains et al. v. The State*, 21 Ala. 218; *Henry v. The State*, 33 Ala. 406; *Bryan v. The State*, 47 Ala. 87; *Anderson v. The State*, 48 Ala. 665; *Harris v. The State*, 50 Ala. 127; *Davis v. The State*, 68 Ala. 58; *Smith v. The State*, 63 Ala. 55; *Merritt v. The State*, 59 Ala. 46; *McCord v. The State*, 79 Ala. 269; *Blackman v. The State*, 98 Ala. 77. The contents of section 4 of the Act of 1903, p. 281 is not clearly expressed in the title of said Act.—*State v. Davis*, 130 Ala. 148; *Watson v. The State*, 140 Ala. 134. On these same authorities the court erred in overruling the other demurrers interposed. Section 4 of the Act is certainly a change from the original purpose of the Act.—*Fourment v. The State*, 46 South. 267; *Stein v. Leeper*, 78 Ala. 519.

ALEXANDER M. GARBER, Attorney General, and THOMAS W. MARTIN, Assistant Attorney General, for the State. The court properly overruled the demurrers raising the question of a misjoinder of offenses.—*Wooster v. The State*, 55 Ala. 217; *Upsher v. The State*, 100 Ala. 2; *Simpson v. The State*, 107 Ala. 76; *Brown v. The State*, 120 Ala. 376; *Untreinor v. The State*, 146 Ala. 133. Section 4 is within the title of the Act.—*Ballantyne v. Wickersham*, 75 Ala. 533; *National Assn. v. Montgomery*, 108 Ala. 336. The court properly refused to permit the defendant to interrogate the juror Hollifield.—*Bayles v. The State*, 63 Ala. 30. There was no occasion for an election by the state.—*Untreinor v. The State*, *supra*. Charges 1, 2, and 4 were properly refused.—*Benson v. The State*, 68 Ala. 513; *Jackson v. The State*, 137 Ala. 80.

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McCLELLAN, J.—in *Wooster v. State*, 55 Ala. 217, it was ruled that objection for misjoinder of offenses constituting misdemeanors could not be taken by demurrer. In felonies, an essential element, among others, to justify joinder in different counts, is that the offenses belong to the same family of crimes. That rule does not prevail with respect to misdemeanors.—*Wooster's Case*, *supra*.

The indictment contained one count charging the use of abusive, etc., language in the presence of a female (Code 1896, § 4306), and three counts purporting to charge a violation of what is commonly called the "Anti-Boycott Act," in that the defendant interfered by threats with the occupation of Miss Le Beau. From the bill it appears that the testimony for the state tended to show that the defendant, in threatening Miss Le Beau with the hostility of labor unions and the destruction of her business or occupation, wherever she was, if she taught persons the art of operating Mergenthaler linotype machines, used language forbidden by the statute. The principle has been long settled in this state that for a single act, though it violates one or more penal statute, there can be but one conviction of the offender.—*Hurst v. State*, 86 Ala. 604, 6 South. 120, 11 Am. St. Rep. 79; *Walkley v State*, 133 Ala. 183, 31 South. 854; *Jackson v. State*, 136 Ala. 96, 33 South. 888; *Gunter v. State*, 111 Ala. 23, 20 South. 632, 56 Am. St. Rep. 17; *O'Brien v. State*, 91 Ala. 23, 8 South. 559. *Untreinor v. State*, 146 Ala. 133, 41 South. 170, and *Schrutchings v. State*, 151 Ala. 1, 43 South. 962, are not in conflict with the principle stated, since the effect of a single act was not involved therein, nor considered. We interpret the testimony, if credited with disfavor to the defendant, who denies its truth, as making a case within the principle above stated.

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The judgment adjudges the guilt of the defendant of both a violation of the abusive, etc., language statute and the "anti-boycott act" in the respect indicated, and this consequent upon the finding of the jury that the defendant was "guilty as charged in the indictment, and further find the defendant to be fined \$137." As clearly appears, the verdict is referred by the jury to both charges; and the amount of the fine assessed must be likewise referred to the conclusion of guilt under both charges. It results, on this phase of the case, that the judgment is erroneous, and a reversal must be entered.

In such cases as this the jury should be instructed, if they are convinced to the requisite degree of the defendant's guilt of one or more of the offenses resulting from the single act of the defendant, to mold their verdict so as to declare their conclusion of his guilt of one of the offenses with which he is charged. In such cases, if this be not done, and a general verdict of guilty as charged in the indictment is rendered, necessarily a defendant, the judgment following the verdict, would suffer two punishments for one single criminal act.

But the right to require an election by the state, in cases where, as here, the single act may have violated two or more statutes, does not exist, for the reason that the purpose to be conserved by an election for which offense the state will seek a conviction is to protect the defendant from his prosecution for two or more like offenses (misdemeanors) under one count of an indictment. Where the criminal act is single, and the counts of the indictment charge the violation of two or more statutes by that single act, or where the proof discovers that condition, the office of election is not present.—*Scrutchings v. State*, 151 Ala. 1, 43 South. 962.

Since a reversal results, we pretermitt decision of the questions raised as to the constitutionality of the "anti-

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boycott law.” However, for the purpose of another trial, we will pass upon the sufficiency of counts 2, 3, and 4 as against the demurrers to them on that score only. The second count is, in our opinion, sufficient. That count follows the language of section 4 of the “anti-boycott act” (Gen. Acts 1903, p. 282), except it omits the words “at any place he or she sees fit.” The demurrer takes this point. We think the quoted words are pure surplusage, since the offense is fully described by the language employed in the section preceding the quoted words, and the quoted words neither expand nor contract the description antecedent to them. We apprehend, however, that as a matter of proof, in order to justify a conviction under this section, some evidence of a legal character must be adduced tending to establish that the party against whom the “force, threats or other means of intimidation” were directed, to prevent such person from engaging in any lawful occupation, was either engaged in a lawful occupation or purposed to enter thereupon. If one threatened, etc., as the section defines, was not then engaged in a lawful occupation, and purposed no engagement in an occupation of any kind, the intent of this section, consistent as it is with the general intent of the whole act, would not be met, because the section undoubtedly contemplates only the protection of a person in the pursuit of any lawful occupation, whether already actually entered upon or not, and does not contemplate the creation of an offense by the mere act or conduct embraced in the “force, threats or other means of intimidation” described in the section. The elements must, of course, be present in the premises to constitute the offense; but the additional elements must be also present, viz.: First, that the person against whom the acts or conduct are directed must be engaged in a lawful occupation, or purpose such an

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engagement, though not actually entered upon; and, second, the acts or conduct employed against such a person must have reference to the prevention of such an engagement or pursuit of a lawful occupation.

From these considerations it results that counts 2, 3, and 4 are not subject to the grounds of demurrer attacking them for insufficiency.

The judgment is reversed, and the cause is remanded.

TYSON, C. J., and SIMPSON, ANDERSON, and MAYFIELD, JJ., concur.

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Damages for Injury to Passenger.

(Decided April 7, 1909. 49 South. 247.)

Carriers; Passengers; Complaint; Sufficiency.—The facts stated in counts 11 and 12 would support a charge of simple negligence, but wanton or willful misconduct cannot be predicated upon them; and where on such facts stated, the pleader attempts to predicate a charge of wanton or willful misconduct, this renders such count inconsistent and repugnant in averment.

APPEAL from Walker Law and Equity Court.

Heard before Hon. T. L. SOWELL.

Action by J. Gus Pearce against the St. Louis & San Francisco Railroad Company for personal injuries received while a passenger. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

The counts of the complaint mentioned in the opinion are as follows:

Count 10: "The plaintiff claims of the defendant the sum of \$1,999 as damages, for that on, towit, the 15th day of October, 1905, the defendant was engaged in the business of operating a railroad in Walker and Jeffer-

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son counties, Ala., for the carriage of passengers for hire, and on, to wit, said 15th day of October, 1905, the plaintiff was a passenger on a railroad train on defendant's line of railroad in said county, and was going east, and at a point near Booker City, in said county of Jefferson, the car on which plaintiff was traveling as such passenger was derailed and wrecked, and plaintiff's arm was badly injured, and his wrist and hand were cut, and his shoulder and body were bruised and injured, which injuries were severe and permanent, and he was greatly frightened, and suffered great mental and physical pain, and was for a long space of time rendered unable to attend to his business as was his wont, and lost valuable time, and incurred doctor's bills and expenses in and about attempting to get cured of his said hurts; and plaintiff further alleges that the cross-ties on defendant's line of road at the point where said injuries occurred were rotten and defective, and that a reasonable and probable consequence of running cars over the same at a high rate of speed would be that said cars would be derailed, and that injuries would occur to passengers on board said train of cars; and the plaintiff alleges that the condition of said cross-ties and track was well known to the defendant at the time of said accident and for a long time prior thereto, yet, notwithstanding such condition of said track and defendant's knowledge thereof, the said cars were propelled by defendant or its agents along and over said track at a great rate of speed, recklessly, wantonly, and intentionally, and as a natural and proximate consequence thereof the said coach on which plaintiff was a passenger was derailed, and plaintiff was injured as aforesaid."

Count 11: Same as 10, down to and including the words "to get cured of his said hurts," and adding: "And plaintiff alleges that at the point where said acci-

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dent occurred the roadbed and track and cross-ties of the defendant were in bad condition and unsafe, and that the cross-ties were rotten, that the track was worn and decayed, that the roadbed was not stable, and said track was not properly adjusted, and that the natural and probable consequence of running a train of cars over said track at said point, at the speed with which defendants' cars, on which plaintiff was a passenger, were being operated, was to endanger the plaintiff's personal safety, and that the condition of the said track as hereinbefore set forth was known to the defendant, yet, notwithstanding said knowledge, the defendant's servants recklessly, wantonly, and intentionally propelled said train of cars along said track at a rate of speed which was dangerous to acquire on a track in the condition thereinbefore alleged, and as a consequence thereof plaintiff was injured."

Demurrers were interposed to these counts as follows: "(1) Said count is inconsistent and repugnant, in that the facts stated constitute only simple negligence, and the count charges willful or wanton injury. (2) The facts stated do not constitute wanton or willful injury. (3) It is not charged that defendant's servants who ran the train as alleged knew of the condition of the track."

BANKHEAD & BANKHEAD, for appellant. The court committed error in overruling demurrer to the 10th and 11th counts of the complaint.—*L. & N. v. Parker*, 96 Ala. 435; *Crocker's Case*, 95 Ala. 412; *Brown's Case*, 121 Ala. 221. The court should have given the affirmative charge as to these counts.—*Nave v. A. G. S.*, 96 Ala. 264; *Marker's Case*, 103 Ala. 160; *Bower's Case*, 110 Ala.; *A. G. S. v. Burgess*, 114 Ala. 57. The court should have given charges 11 and 12 requested by defendant.—*I. & N. R. R. Co. v. Crawford*, 89 Ala. 240; *Swape's Case*, 115 Ala. 287, and authorities supra.

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LEITH & GUNN, and JOHN A. COLEMAN, for appellee. The court did not err in submitting the question of wanton or willful negligence to the jury.—*A. G. S. v. Hill*, 90 Ala. 80. The court did not err in refusing charges 11 and 12.—*L. & N. v. Anchors*, 22 South. 281; 110 Ala. 328. These charges were covered by charges K and M given for the defendant. The court did not err in its rulings on the evidence.—*L. & N. v. Stewart*, 128 Ala. 313; *Parrish v. The State*, 139 Ala. 44; *A. G. S. v. Bailey*, 112 Ala. 176; *R. & D. R. R. Co. v. Vance*, 93 Ala. 144; 93 Ala. 514; 6 Thomp. on Neg. 740.

DOWDELL, C. J.—While there are many assignments of error on the record, of the questions raised only two are insisted upon in argument by counsel for appellant, and these relate to the tenth and eleventh counts of the complaint. The assignments which relate to these two counts we think are well taken. These counts were evidently intended by the pleader, and so treated by the court, as counts for wanton and intentional wrong. As such each are defective and subject to demurrer.

The facts stated in regard to the defective condition of the defendant's railroad track would undoubtedly support a charge of negligence; but on the facts stated the pleader predicates a charge of willful or wanton misconduct, and not of simple negligence, and in this respect each of the counts was inconsistent and repugnant in its averments and subject to the demurrer interposed.

For the errors indicated, the judgment is reversed, and the cause remanded.

Reversed and remanded.

SIMPSON, DENSON, and MAYFIELD, JJ., concur.

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Damages for Injury to Passenger.

(Decided Feb. 11, 1909. 48 South. 981.)

1. *Bill of Exceptions; Time for Filing; Extension.*—Where the bill of exceptions is not signed within the time of the first order, and the order extending the time, and within which time the bill was filed and signed, is made by the court instead of by the presiding judge, such bill of exceptions cannot be considered.

2. *Same.*—Circuit Court Rule No. 30, forbids the extension of time for signing a bill of exception to be extended into a succeeding term by agreement of counsel, but does not prohibit the extension by the presiding judge, except within the limits of six months. (Sec. 620, Code 1896.)

3. *Judgment; Construction of Entry; Demurrer.*—The judgment entry in this case stated and examined, and held to show only a ruling on demurrer to the whole complaint asserting the damages claimed to be remote and speculative, and not upon demurrers to the separate counts of the complaint.

4. *Appeal and Error; Review; Presumption as to Correctness of Lower Courts Ruling.*—The recitals in the transcript must affirmatively show error in the action of the lower court to overcome the presumption indulged as to the correctness of the court's ruling; so in the absence of judgment entry showing unequivocally the ruling on demurrer, the presumption will be indulged on appeal that the demurrer was abandoned.

5. *Same; Record; Matters Not Shown.*—Evidence not in the record will not be considered on appeal.

6. *Pleading; Demurrer; Scope.*—Objection to damage claimed as remote and speculative, must be taken by motion to strike or by special charges requested, notwithstanding the complaint may be tested by demurrer if not sufficient to apprise defendant of the character of the injury flowing from the wrong charged.

7. *Carriers; Passengers; Duty to Notify of Transfer Points.*—A carrier owes its passengers the duty to advise them by reasonable means of schedules, routes and transfer points at which passengers should change in order to reach their destination.

2. *Same; Actions; Materiality of Allegation.*—Where the action was for damages for negligent failure to notify passenger where to change cars, an allegation that the train was propelled by steam, was immaterial and unnecessary to be proven.

9. *Same; Excessive Damages.*—A recovery of \$500 damages is not excessive where the passenger, a lady, was deflected from her journey, compelled to undergo added travel and stops in hotels, re-

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sulting in annoyances, illness, anxiety and some expense, on account of the carrier's failure to notify her of a change of cars.

APPEAL from Montgomery City Court.

Heard before Hon. A. D. SAYRE.

Action by F. E. Ashley against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

The only counts that are referred to in the opinion and necessary to be here set out are the fifth, sixth, and seventh counts, which are as follows:

"(5) Plaintiff claims of the defendant the sum of \$1,999 as damages, for this: That heretofore, on to wit, the 15th day of September, 1904, the defendant was engaged in operating by steam a railway as a common carrier of passengers from the city of Montgomery, in the state of Alabama, to various points in the state of Georgia and in the state of Alabama: And plaintiff avers that she bought a ticket at the Union Station in the city of Montgomery, Ala., to Andalusia, Ala., and that she was unfamiliar with the road of the defendant, and that the servant, agent, employe, or conductor of the defendant called upon her for her ticket; that she showed the said servant, agent employe, or conductor her said ticket; and that the servant, agent, or conductor, after inspecting the said ticket, did negligently fail to inform plaintiff that she would have to change cars at the town of Union Springs, in the state of Alabama, and take another car, so that she might reach her designation, and by reason of said negligence on the part of the said conductor, servant, agent, or employe of the defendant as aforesaid she was greatly injured, in this: It was in the nighttime, and plaintiff was put off at a strange place, to wit, Cuthbert, Ga., where she had to remain until the next day, so that she might take passage to said Union Springs, and there change cars that she

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might reach her destination. And plaintiff avers that she was made sick and was greatly frightened, she suffered great mental anguish and physical pain, that it prevented her from filling an engagement she had at Andalusia, and that she was prevented from reaching her destination, all to her great damage as aforesaid of \$1,999. And plaintiff avers that the damages claimed in this count are for the same cause of action that is claimed in the first, second, third, and fourth counts of this complaint."

(6) Same as count 1, down to and including "the city of Montgomery," where it first occurs therein, and adds: "To Cuthbert, in the state of Georgia; that along its said lines was the station in said state of Alabama called Union Springs; that from said Union Springs, Ala., ran another railway line operated by defendant to Andalusia, Ala., and that on said day and date plaintiff bought a ticket at Montgomery, Ala., to Andalusia, Ala., and became a passenger on one of the cars of the defendant; that in order to go from Montgomery, Ala., to Andalusia, Ala., on said ticket, plaintiff should change cars at Union Springs, Ala., and the defendant so negligently conducted its said business that by reason thereof plaintiff did not change cars at said Union Springs, Ala., but was carried beyond Union Springs, Ala., and by reason of said negligence she was greatly damaged, in this to wit: [Here follows catalogue of her special injuries and damages, same as in count 6.]"

(7) Same as count 6, except that it alleges that it was the duty of defendant, its servant, agent, or employe, to notify plaintiff that she should change cars at said Union Springs, Ala., for said Andalusia, Ala.; but, notwithstanding this duty, the defendant, or its servant, agent, or employe, did negligently fail to so notify

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plaintiff, and by reason thereof the plaintiff was carried beyond Union Springs, etc.

There was judgment for plaintiff in the sum of \$500, which judgment was rendered on October 15, 1906. On Wednesday, November 14, 1906, and on December 14, 1906, an order was granted by the court extending the time for signing the bill of exceptions—in the first instance 30 days, and in the second instance 20 days; 30 days having been granted from the day of the judgment. On Saturday, December 29, 1906, the motion for a new trial was overruled, and the presiding judge of the court granted an order extending the time for filing the bill of exceptions 30 days, and a further order was entered by the presiding judge extending the time to and including February 7th.

CHARLES P. JONES, W. F. THETFORD, JR., and J. B. JONES, for appellant. The bill of exceptions still stands as to the ruling of the trial court on the motion for a new trial, and should not be stricken.—*Alabama Mid. Ry. Co. v. Brown*, 129 Ala. 682. The judgment sufficiently shows the overruling of the demurrers to the complaint.—*A. G. S. R. R. Co. v. Shahan*, 116 Ala. 302. Neither counts 5 nor 7 stated a cause of action.—Section 3333, Code 1896; *Southern Ry. Co. v. Bunt*, 131 Ala. 591; *Cent. of Ga. v. Freeman*, 134 Ala. 354; *Page v. N. Y. Cent. Ry. Co.*, 6 Duer 523; *Barker v. N. Y. Cent. Ry.*, 24 N. Y. 599. Under the pleadings and proof the defendant was entitled to the general charge.—*Dean v. E. T. V. & G. R. R. Co.*, 98 Ala. 586; *Southern Ry. Co. v. McGowan*, 43 South. 378; *Rogers v. Brooks*, 105 Ala. 549; *Central Railroad & Banking Co. v. Ingram*, 95 Ala. 152. The verdict was excessive.—*Richardson v. Bir. Cot. Mfg. Co.*, 116 Ala. 381.

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HILL, HILL & WHITING, for appellee. The bill of exceptions was not signed in time, and the motion to strike should prevail.—Rule 30, p. 1200, Code 1896; *Abercrombie, et al. v. Vandiver*, 140 Ala. 228; *Arnett v. Western Ry. Co.*, 39 South. 775; *Western of Alabama v. Russell*, 39 South. 311; Acts 1900-01, p. 830. The record does not show a ruling on demurrer so as to raise the question of the correctness of the count.—*Couch v. Davidson*, 109 Ala. 313. Neither counts 5 nor 7 were subject to the demurrers interposed.—15 L. R. A. 349; 24 N. Y. 599; 6 Duer 523; 2 Redfield's Neg. 259. The court did not err in refusing the charges requested by the defendant.—7 Am. St. Rep. 629; 11 Am. L. Reg. 159; 24 N. Y. 599. The court did not err in overruling the motion for a new trial.—*Simpson v. Golden*, 114 Ala. 336. It was the duty of defendant to announce the change of cars.—Authorities supra.

McCLELLAN, J.—The necessary continuity of the time, from the main trial to the date of the attempted authentication of the purported bill of exceptions for that trial, within which it should, to be effective, have been signed, was broken by the effort of the court, instead of the presiding judge, to extend it.—*Scott v. State*, 141 Ala. 39, 37 South. 366; *Arnett v. Western Ry.*, (Ala.) 39 South. 775; *Western Ry. v. Russell*, 144 Ala. 142, 39 South. 311, 113 Am. St. Rep. 24. Hence, so far as the main trial is concerned, the paper purporting to be a bill of exceptions thereon is valueless.

Counsel for appellant insist that this paper is at least a valid bill of exceptions to bring up for review the action of the court below in overruling the motion for a new trial. The motion was regularly retained on the proper docket of the court until December 29, 1906, on which date it was overruled. In the order overruling

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the motion the defendant (appellant) was granted 30 days in which to perfect its bill of exceptions on the motion for a new trial. On January 26, 1907, the presiding judge, as such, undertook to extend the time to February 7, 1907. The paper was in fact signed by the judge on February 6, 1907. By the act approved December 6, 1900, (Acts 1900-01, p. 122), three terms of the city court of Montgomery are provided for. One of these terms commences on the first Monday in February. Rule 30 of circuit court practice (Code 1896, p. 1200) merely forbids the extension, by agreement of counsel, of the time for signing the bill of exceptions into a succeeding term of the court, but does not inhibit the extension by the presiding judge of the time for signing to the limit of six months.—Code 1896, § 620. There is a field of operation for both the rule and the statute cited.—*Cooley v. U. S. L. Ass'n*, 132 Ala. 590, 31 South. 521. The extension in *Abercrombie v. Vandiver*, 140 Ala. 228, 37 South. 296, was by agreement of counsel. The bill here was signed within the time extended by the presiding judge; and hence became a part of the record for service in respect of a review of the action of the trial court upon the motion for a new trial.—*Ala. Mid. Ry. v. Brown*, 129 Ala. 29 South. 548.

The rulings on the pleadings will be first considered. The judgment, as here important, recites: "This day came the parties by their attorneys, and by leave of the court first had and obtained the plaintiff amends her complaint by interlining count three (3) and by adding thereto counts numbered six (6) and seven (7). And the plaintiff withdraws count four (4) of the complaint, and the defendant's *demurrer to the complaint* being argued by counsel and understood by the court, it is considered and ordered by the court, and it is the judgment of the court that the *said demurrer to the com*

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plaint be and the same is hereby overruled." Italics supplied.) The only demurrers we find in the transcript are thus framed: The caption reads: "Comes the defendant, by attorney, and demurs to the complaint filed in this cause, and separately to each count thereof, and assigns as grounds of demurrer the following: * * *." The several counts, from 1 to 5, inclusive, are separately assailed; the grounds of objection to each count being directed thereagainst immediately after the statement, "To the first count," "To the second count," and so on through the other three. After dealing with the five counts, the demurrer concludes, "To the complaint as a whole and separately to each count thereof," following this with two grounds alleging that the damages claimed are remote and that they are speculative. A separate demurrer, separately filed, to count 7 of the complaint, also appears in the record.

Counsel for appellee take the point, and stress it in brief, that the judgment entry shows a ruling on demurrer to the complaint as a whole. Counsel for appellant controvert this contention, and insist that the recital quoted evinces a ruling overruling, not only that part of the demurrer expressly addressed to the whole complaint, and as well those addressed to each count, including count 5, but also overruling the separate demurrer to count 7. In support of appellant's view we are cited to the case of *A. G. S. R. R. v. Shahan*, 116 Ala. 302, 22 South. 509, from the transcript of which a judgment entry very similar to that with which we are now concerned is copied in brief. There the court took no notice of the question at hand; and, though the conclusion therein reached might have been different, had the point been taken, that decision is not authoritative, for the very reason that no ruling on the present point was made. In short, the question was not considered or de-

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cided. It is manifest that the gist of the inquiry involves a construction of the judgment entry, viz.: Was the court's action, to be drawn alone from the judgment entry in the absence of ambiguity therein, upon demurrer to the complaint as a whole or upon demurrer to only parts of the complaint? Appellant can derive nothing in its favor from the caption (of the demurrer) quoted; for the pleading itself expressly addresses the objections contained in it to separate counts of the complaint, except in its last paragraph, wherein the whole complaint is assailed.

We construe the recital to show only a ruling on demurrer to the whole complaint, and not upon demurrers covering separable parts of the complaint. Such was the conclusion of this court in *Griel v. Lomax*, 86 Ala. 132, 5 South. 325, upon substantially the same inquiry we now have. In that case the complaint contained two of the common counts and one special count, and the judgment entry recited "that the defendant demurred to the complaint," and that the court sustained the demurrer; but the demurrer copied into the transcript is addressed only to the special count. The plaintiffs then amended their complaint by adding another special count, and the defendant then demurred "to the complaint as amended," but his demurrer was overruled. Upon this status the court said: "The demurrer, as shown by the judgment entry, is taken to the entire complaint, as amended, and not to any particular count supposed to be defective." In our recent case of *Alabama Chemical Co. v. Niles*, 156 Ala. 298, 47 South. 239, the *Griel-Lomax* decision was, in substance and effect, followed.

The presumption, on appeal, of the correctness of the action of the primary court, must be affirmatively overcome by recitals in the transcript presented here, before

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error to reversal is shown; and, in keeping with this necessity, to acquit the trial court of error, it will be presumed, in the absence of an unequivocal ruling by the court on demurrer, that the demurrant abandoned it. We have, hence, as the only demurrer addressed to the whole complaint, and on which only the judgment entry shows the court to have ruled, that asserting the damages claimed to be remote and speculative. These objections cannot be taken by demurrer; motion to strike or special charges to the jury being the approved method to eliminate, if improper, such claimed elements of recovery. Of course, where the pleading is not sufficiently definite and certain to apprise the defendant of the character of the injury proximately flowing from the wrong, demurrer is the proper pleading to test that infirmity.—*City Delivery Co. v. Henry*, 139 Ala. 161, 34 South. 389. The demurrer, to the whole complaint, was correctly overruled.

Counsel for appellant have presented an elaborate argument in support of their contention that neither the complaint, nor any count of it, states a cause of action, and hence will not support the judgment; and the ground of the insistence is that no primary duty rests on the defendant, as a common carrier of passengers, to without being sought for the information, inform a passenger of the necessity to change cars in order to reach his destination, as indicated by his ticket or otherwise properly secured right to transportation to a destination beyond a point at which, to reach that destination, the passenger must change cars. The argument is so earnest, as well as elaborate, we feel impelled to respond to it; for, if the contention is sound, a reversal would result.

While the question in hand has not been, so far as we are now advised, the subject of adjudication apart from

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any other related question, yet there is one decision of a learned court in which the duty, the breach of which the complaint complains, was affirmed as an essential factor to the conclusion reached therein. This view is confirmed by the texts to be quoted. In 6 Cyc., at page 584, it is said: "Where it is necessary for the passenger to change cars or trains in the prosecution of the journey, reasonable notice thereof by the servants of the carrier is sufficient, and the passenger not governing himself by such notice cannot recover damages if he loses his connection." In 2 Redfield's Law of Railways (6th Ed.) it is said: "The duty of railways where there is a change of cars has often been commented upon by the courts. It seems to result, from the very nature of the case, that the very least which could be regarded as the reasonable performance of the duty of the company towards its passengers would be that the passenger should have timely notice of the change and reasonably sufficient time to make it."

The first-quoted text is based upon the decisions of the New York courts in *Page v. N. Y. Central R. R.*, 6 Duer, 523, and later, after revivor in the name of Barker, was taken to and affirmed by the Court of Appeals, and reported in 24 N. Y. 599. Page bought a ticket from Albany to Lyons. The defendant operated two trains, leaving Albany within an hour of each other, on which Page's ticket was good. One of these ran through Lyons, and the other ran to Syracuse, at which point, to reach Lyons, a change of cars from that train was necessary. Some of the testimony for the plaintiff tended to show that the ticket agent at Albany told the plaintiff that the Syracuse train, taken by the plaintiff, would take him to Lyons. This was controverted. Some of the testimony for the defendant tended to show that the plaintiff was informed, or was offer-

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ed such opportunity as would have informed an ordinarily intelligent person, employing reasonable care and caution, that a change of cars at Syracuse was necessary. Obviously a material inquiry in the premises, whether as effecting the exoneration of the carrier from the consequences of the asserted misdirection of the agent at Albany or not, was the existence vel non of the primary duty of the carrier to notify passengers of the necessity for a change of cars in order to travel to Lyons. Writing to that proposition the Supreme Court (6 Duer, 529) declared: "If the defendant gave such published notice of the running of its trains, and such special notice in the cars, of the necessity of changing cars at any particular station, that every traveler of ordinary intelligence, by the use of reasonable care and caution, would obtain all the requisite information as to the route to be traveled, and the cars to be taken at an intermediate point of the voyage, it discharges its whole duty in this respect. If a passenger, merely by a failure to use such care and caution, instead of changing cars at a particular station, and taking cars which go to the place to which he has paid his fare, continues in the cars in which he started, and is carried in another direction, the result is to be attributed to his own negligence, and not to a breach of duty, or of contract, on the part of the company. The fact of the publicity of such regulations, the time, manner, and circumstances of publishing them, and whether sufficient to bring home actual notice to the passenger, provided he bestows reasonable care and attention, in order to inform himself, is one to be determined by the jury." We take the liberty of transposing, in this connection, this clause of the opinion: "If the plaintiff had traveled the road before, in the train leaving at the same hour, it would be a fact bearing upon the question of knowledge. The

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weight of the fact would depend upon the frequency and recency of the period of such traveling."

From the quoted texts, as well as from the observations of the court in the Page Case, it is seen that a primary duty rests on the carrier of passengers to give publicity to its regulations, whether of schedule, including places whereat its train will stop for the discharge or reception of passengers, or of routing on its roadway, embracing points of change to another line of its roadway or that of another company, to the end that the ordinarily prudent and intelligent traveler may be informed of the facts essentially necessary for him to accomplish his journey. The reason for such duty inheres in the nature of the service afforded by such agencies, in connection with the power possessed by carriers to formulate and enforce such reasonable regulations as the conduct of the business requires. Within proper limits, they may make schedules, create routes and prescribe transfer points at which passengers, traveling beyond, must change cars. Having this power, it would be wholly irrational to say that no duty, commensurate with the power, rests on the carrier to advise the traveling public, by reasonable means, of regulations so necessary to any journey by rail; for such a pronouncement would essentially, cast upon the passenger the obligation, not simply to exercise reasonable prudence and diligence to ascertain the regulations, with respect to where, when, and how his journey may be made under regulations existing and published, but to seek out unpublished regulations the operation of which affect his journey. The result would be, naturally, that no carrier of passengers would make any effort to give publicity to its regulations touching matters associated with the employment of its transportative agencies. The decision of *A. G. S. R. R. Co. v. Carmichael*, 90 Ala. 19, 8 South. 87,

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9 L. R. A. 388, announces, though only in argument of a related question, the duty on the passenger, or proposed passenger, raised by the performance of the primary duty we have said rested on the carrier, to exercise reasonable prudence and diligence to ascertain such regulations in the premises as the carrier has promulgated. If the passenger fails to exercise such care and diligence, his negligence, and not that of the carrier, is the proximate cause of a resultant injury. The Page Case, *supra*, so holds, and we think the reasons stated before are conclusive of the correctness of the views entertained.

By brief of counsel for appellant we are advised that the case was tried on counts 5, 6, and 7. Count 6 ascribes the negligence complained of to have been that of the conductor in not notifying her of the necessity to change cars at Union Springs, in order to seasonably pursue her journey to Andalusia. Counts 6 and 7 ascribe the negligence to the defendant, or its agents or servants, in not so informing the plaintiff. We are dealing with the complaint only, with a view to determine whether the complaint states a cause of action. In the light of the considerations stated, we must hold that these counts do each state a cause of action, though, if assailed by properly grounded demurrer, we are not prepared to say, and are not now so invited, whether these counts would be immune therefrom.

Recurring to the motion for a new trial: The only errors urged and argued, aside from the rulings on the pleadings which have been considered, are that the affirmative charge, requested for the defendant, should have been given, on the grounds, first, that there was a failure of proof, in that the motive power was alleged to have been steam, and there was no proof in support of it; and, second, that the affirmative proof shows that

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such announcement of the necessity to "change cars at Union Springs for Andalusia" was only met by testimony of a negative character, as that the witness did not hear such announcement, if made—and that the verdict was excessive. It is important to note that there was no semblance of testimony offered tending to show any kind of publishing, by the defendant, of its schedules, routes, or changes of cars for any destination over its lines. This fact, if so, is found in the brief, but not in the record, where, to avail, it must be.

There was testimony tending to support the averments of counts 5, 6, and 7, and on it the jury were authorized to base a verdict for the plaintiff. The insistence that the affirmative evidence must prevail over that purely negative, as stated before, cannot avail, because from the testimony of both Mrs. Ashley and her daughter it appears that both testified positively that no announcement or notice of the necessity for an change of cars at Union Springs was made or given; and the facet that at other times their testimony in this regard was negative, as indicated, did not eliminate the positive statements alluded to. The bill itself refutes the last insistence.

We are of the opinion that the allegation of the character of the motive power—steam—was wholly immaterial and unnecessary to be proven in this action, based, as it is, on alleged negligence entirely foreign to what means of power were employed to drive the train on which plaintiff was a passenger of the defendant, a common carrier.

On the question of asserted excessiveness of the verdict, we are not so convinced of its unreasonableness as to warrant us in reversing the trial court. There was evidence before the jury tending to show illness suffered by plaintiff as a result of the negligence charged, and also annoyance, anxiety, and some financial expense en-

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tailed thereby. The plaintiff was a woman, was deflected in her journey, was delayed therein, was compelled to bear added travel, and to sojourn in hotels which, she testified, was unpleasant to her.

The judgment must be affirmed.

DOWDELL, C. J., and ANDERSON and MAYFIELD, JJ.,
concur.

Horan v. Gray & Dudley Hdw. Co.

Damages for Injury to Employee.

(Decided Feb. 4, 1909. Rehearing denied April 6, 1909.
48 South. 1029.)

1. *Master and Servant; Injuries to Servant; Complaint.*—Where the injury is alleged to have resulted from a fall into an unguarded hole in a basement, a complaint which fails to aver any duty on the employer to warn the employe of the danger which resulted in the injury is insufficient.

2. *Same; Construction.*—Pleading being construed most strongly against the pleader, it will be presumed that knowledge on the part of the employe of the danger existed where the complaint fails to allege any duty of the employer to warn against the danger or a want of knowledge by the employe of the danger.

3. *Same; Danger to Employee; Duty to Warn.*—An employer is not bound to warn his employe against a known danger or one which could be known by the use of ordinary care.

4. *Appeal and Error; Review; Matter Not in Record.*—Where the demurrers to the pleas are not shown by the record, the overruling of such demurrers cannot be reviewed.

5. *Same; Harmless Error; Demurrer to Plea.*—It is harmless error to overrule a demurrer to a plea where the defendant was entitled to a verdict on another plea.

6. *Judgment: Right to; Establishment One Plea.*—A defendant is entitled to a judgment where the evidence establishes one of his several pleas just as much as if all were established.

APPEAL from Birmingham City Court.

Heard before Hon. C. C. NESMITH.

[Horan v. Gray & Dudley Hdw. Co.]

Action by William Horan against the Gray & Dudley Hardware Company for damages for injuries suffered in the course of his employment. Judgment for defendant, and plaintiff appeals. Affirmed.

Count 1 was in the following language: "Plaintiff claims of defendant \$10,000 as damages, for that on, to wit, the 4th day of January, 1905, plaintiff was the servant or employe of the defendant, and engaged in the discharge of his duties as such servant or employe, which duty was to go into the basement of a certain school building in Woodlawn, Ala., to take measurements for cold air pipes to a furnace which was being placed in said school building by defendant through its servants or employes. Plaintiff avers that in fitting said furnace in said school building, or preparing for its use or operation, defendant's said servants or employes, acting within the scope of their authority, dug or excavated a ditch or hole in the cellar or basement of said school building near or adjoining said furnace which ditch or hole was uncovered and without guard or signal showing its existence, and without anything to warn of its danger, and which said ditch or hole was dangerous to any one working in said basement or cellar near said furnace and without knowledge of the existence of said ditch or hole. Plaintiff avers, further, that defendant's foreman, Ollie Chaddock, who had superintendence intrusted to him and was then in the exercise of his said superintendence, negligently failed to warn plaintiff of the existence of said ditch or hole, and, as a proximate consequence of his negligent failure to warn plaintiff of the existence of said ditch or hole, plaintiff fell or stepped into said hole, and injured, strained, or broke his right leg or ankle, from which injury plaintiff suffered great physical and mental pain, and was caused to expend money and lose time in curing himself from his said injuries and hence this suit."

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The fourth count is as follows: "Plaintiff claims of the defendant corporation ten thousand dollars (\$10,000.00) as damages, for that on, to wit, the 4th day of January, 1905, plaintiff was employed and in the service of defendant, and in the discharge of his duty as defendant's agent or servant; that defendant was, through its agents or servants, engaged in putting in or installing a furnace or heating apparatus in a school building in Woodlawn, Jefferson county, Ala., and one Ollie Chaddock was the foreman of defendant, and he was delegated with authority from defendant to direct servants or employes of defendant engaged in that particular work. And plaintiff avers that the said Ollie Chaddock instructed the plaintiff to take certain measurements from a furnace in the basement of said school building, when there was but little light to enable plaintiff to see; and the said Ollie Chaddock negligently failed to tell, warn, or inform plaintiff that there was a hole or ditch near said furnace which was dangerous. And plaintiff avers that, as a proximate consequence of such negligent failure of the said Ollie Chaddock to warn plaintiff of the danger to him by reason of said hole or ditch, plaintiff walked or fell into said ditch or hole, and strained, fractured, or injured his leg, ankle, or foot, and suffered great mental and physical pain therefrom, and was rendered less able to work and earn money, to his great damage; and hence this suit."

Demurrers were interposed to count 1 as follows: "It is not alleged in said count that plaintiff could not, by the exercise of due care, have seen said ditch or hole. No state of facts is averred, making it incumbent upon plaintiff to warn defendant of the existence of said ditch or hole. It is not averred that he could not have seen said ditch or hole by the exercise of due care. It is not averred that plaintiff did not know of the exist-

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ence of said ditch or hole at the time he fell into it. It is not alleged that said ditch or hole was so dangerous that it was the duty of the defendant to warn plaintiff of the existence of said ditch or hole."

The same demurrers were interposed to count 4, with this additional one: It does not appear that said Ollie Chaddock knew that there was but little light in said basement.

Plea 7 was as follows: "Defendant says that plaintiff proximately contributed to the injuries complained of in this: Plaintiff knew that it was usual and customary, in installing furnaces and heating plants in buildings, in many instances to dig a ditch or make an excavation for cold-air pipes, or other pipes connecting with said furnace; and hence plaintiff knew, or ought to have known, by reason of that fact, that there was or might be a ditch or excavation in said basement, and without making inquiry as to the existence of such ditch or excavation, and without light, negligently went into said basement."

ROBERT N. BELL, for appellant. The court erred in sustaining demurrers to the complaint.—Sec. 1749, sub's. 2 and 4, Code 1896. For the law of the case see the following authorities.—*Ala. S. & W. Co. v. Clements*, 40 South. 971; *Ry. Co. v. Thompson*, 77 Ala. 457; *Campbell v. Lunsford*, 83 Ala. 512; *Sloss Co. v. Noles*, 129 Ala. 410. The burden is on the defendant to show contributory negligence.—*O'Brien v. Tatum*, 84 Ala. 186. This the defendant failed to do.—*Wilson v. R. R. Co.*, 85 Ala. 269; *R. R. Co. v. Hall*, 87 Ala. 708; *Kansas City v. Thornhill*, 37 South. 412; *Shea v. Manning*, 37 South. 682; 12 L. R. A. 843. The affirmative charge was improperly given.—*Powers v. Southern Ry. Co.*, 135 Ala. 537; *White v. Farris*, 124 Ala. 470. The process of draw-

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ing inferences is always for the jury.—*Hollingsworth v. Martin*, 23 Ala. 591; *Easterling v. The State*, 30 Ala. 46.

CABANISS & BOWIE, for appellee. Counsel discuss the rulings of the court on pleadings, but without citation of authority. They insist that under the evidence the defendant was under no obligation to warn plaintiff of the existence of the hole or ditch, and in any event was not negligence in failing to warn him.—*Lebatt Master & Servant*, Secs. 239 and 241. Plaintiff's inattention and heedlessness brought the injury upon himself.—*Lebatt Master & Servant*, Sec. 281. On the proposition that the defendant is guilty of no negligence in failing to warn plaintiff, counsel cite, *L. & N. v. Bouldin*, 121 Ala. 198; *N. Bir. St. Ry. Co. v. Wright*, 130 Ala. 419; *Sloss S. & I. Co. v. Knowles*, 129 Ala. 410. The servant is chargeable with the knowledge if under all the circumstances he should have known of the danger, or if he could have known it by the exercise of reasonable care and diligence.—*Lebatt, Master & Servant*, pp. 831 and 1112-13, and authorities there cited.

DOWDELL, J.—The first and fourth counts of the complaint, to which demurrers were sustained, were each defective and subject to the demurrer. In neither of said counts is it alleged that any duty existed on the part of the master to warn the servant of the danger from which the injury resulted, nor is any state of facts averred from which such duty would arise. For aught that appears from the averments of these two counts, the servant himself knew of the existence of the danger, and, according to the familiar rule of construing the pleading more strongly against the pleader, it will be presumed, on demurrer raising the question, from a failure to aver

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want of knowledge, that such knowledge existed. If the plaintiff had knowledge of the danger, or by the exercise of ordinary care could have known of it, then the defendant was under no legal duty to warn him. The demurrer sufficiently raised the question, and the ruling of the court thereon was free from error.

The judgment entry recites that demurrers to pleas 7 and 8 were overruled, but the demurrers to these pleas are nowhere set out in the record. We cannot tell what the demurrers were, and for aught we know they were general, and for this reason were overruled. In this state of the record, the action of the court on the demurrers cannot be reviewed on appeal. This has been repeatedly held by this court.

Where there are several pleas upon which issue is joined, the establishment of any one of them entitles the defendant to a verdict, as much so as the proving of all of them. The seventh plea of the defendant in the case before us, upon which issue was joined, was proven without conflict in the evidence. This authorized the giving of the general affirmative charge, as requested in writing by the defendant. Under this state of the case, whether error was committed or not in the ruling of the court on the demurrer to the fourth plea is of no consequence, since, if error was committed, it was error without injury.

It is unnecessary to consider other questions discussed by counsel, as what we have ruled is conclusive of the case. The judgment is affirmed.

Affirmed.

SIMPSON, DENSON, and MAYFIELD, JJ., concur.

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Pennsylvania Coal Co. v. Bowen.

Action for Damages for Injury to Employee.

(Decided April 15, 1909. 49 South. 305.)

1. *Master and Servant; Injury to Serrant; Incompetent Fellow Serrant.*—Before recovery can be had against the master for the employment of incompetent servants it must appear that the master knew of the incompetence of the servant, or by the exercise of reasonable diligence could have ascertained that fact, and a complaint seeking recovery on that account must allege that the master knew of the incompetency, or by the exercise of reasonable diligence could have known it, although it is not necessary that these exact words should be used.

2. *Same; Complaint.*—A complaint which alleges that it was the duty of the employer to employ as fellow servants men reasonably skilled in the duties which they were to perform, and that the employer violated this duty to plaintiff and negligently employed and placed in the same room with him a third person who was not reasonably skilled in the duties he was to perform or who was incompetent, careless, etc., states a good cause of action against the demurrer interposed; and the further allegation thereof that as a proximate consequence plaintiff received the injuries complained of, sufficiently shows the connection between the incompetency of the third person and the injury to bring it within the rule that mere general averment was sufficient, without stating the *quo modo* or the acts constituting the negligence.

3. *Same; Evidence.*—Where the action was for injuries to a miner employed in a coal mine by a rock falling on him and the evidence showed that the plaintiff had the direction of the work, and it was not shown that he or anyone else suggested the necessity of propping the place before the injuries, or that the duty rested upon a fellow employee, the evidence failed to show a causal connection between the incompetency of the fellow servant and the injury.

4. *Same; Negligence; Evidence.*—A count seeking to recover damages for injuries to an employee in a coal mine caused by the falling of a rock and based on the employer's failure to furnish a safe place to work is not sustained by evidence of the failure of the employer to furnish the employee with timbers, where the employee had taken a contract to drive a heading at so much per yard, and no obligation is shown on the part of the employer to prop the place where the injury occurred.

5. *Same; Safe Place to Work; Evidence.*—The evidence in this case stated and examined and held not to show that the employer failed to furnish the employee a safe place in which to work.

6. *Same; Evidence.*—Where it was shown that a superintendent had superintence relative to work on the outside of the mines only, it was not competent, in an action for injury resulting to an employee

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from falling rock in the mine, to show that such superintendent was not familiar with the work inside the mine.

7. *Same.*—Evidence of work done in the mine by the fellow servant and a third person after the injury, was inadmissible, in the absence of a showing that the failure to prop the place before the accident had any causal connection with or was due to the fellow servant's incompetence, the action being for injuries resulting from the incompetency of the fellow servant.

8. *Same; Incompetent Fellow Servant.*—The question being whether a servant was competent, it was not permissible to show whether, as shown by his work, he was a careful or careless miner.

9. *Evidence; Opinion Evidence.*—One not shown to be an expert is not competent to testify as to the proper way of driving a heading in a coal mine, or as to the manner in which the work had been done.

APPEAL from Walker Law and Equity Court.

Heard before Hon. T. L. SOWELL.

Action by Robert E. Bowen against the Pennsylvania Coal Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

The complaint contained a number of counts. The third count is in the following language: "Plaintiff claims of defendant, the Pennsylvania Coal Company, a corporation, \$2,000 as damages, for that on, to wit, the 14th day of August, 1905, plaintiff was an employe of the defendant, and was working in a coal mine in Walker county, Ala., and whilst in said employment certain rock or slate fell upon plaintiff and injured his back and the injuries to his back and body are permanent, and it also injured his legs and arms, and said injuries are permanent, and as a proximate consequence thereof plaintiff lost valuable time, and incurred large doctor's bills and bills for nurse hire, and suffered great pain, both physical and mental. And plaintiff alleges that it was the duty of defendant to employ as fellow servants of the plaintiff men who are reasonably skilled in and about the duties they were to perform, who were competent, and who were careful; but the defendant violated its duty to plaintiff in this respect, and negli-

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gently employed and placed in the same room with plaintiff one Martin Sharrat, who was not reasonably skilled in the duties he was to perform, or who was incompetent or careless. And plaintiff alleges that, as a proximate result of said employment of the said Martin Sharrat as alleged, he received the injuries above set out; and hence this suit." The demurrers are sufficiently stated in the opinion. The following charges were refused to defendant: (1) "If the jury believe the evidence, it cannot find for the plaintiff under the third count." (3) "The court charges you that you cannot find for plaintiff under count 14 on account of the failure to furnish him timbers." (5) The general affirmative charge as to the fourteenth count.

BANKHEAD & BANKHEAD, for appellant. The demurrer to the 3rd count should have been sustained.—*1st Nat. Bank v. Kinlock*, 144 Ala. 308. The testimony showed that the plaintiff and another were independent contractors and had control of the means and agencies for doing the work.—*Harris v. McNamara*, 97 Ala. 181. It was their duty, therefore, to look after and make safe the roof at the place of work.—*Woodward I. Co. v. Cook*, 124 Ala. 349; *Pioneer Co. v. Thomas*, 133 Ala. 279. The defendant was entitled to the general charge for several reasons.—*Harris v. McNamara, supra*. Counsel discuss given and refused charges as well as exceptions to evidence, but without citation of authority.

LEITH & GUNN, for appellee. Count 3 was sufficient.—*A. G. S. v. Vail*, 142 Ala. 134. The relation of employer and employe existed between the parties.—*T. C. I. & R. R. Co. v. Hayes*, 97 Ala. 201; *Harris v. McNamara*, 97 Ala. 181. The case at bar is distinguishable from that of *Pioneer M. & M. Co. v. Thomas*, 133 Ala. 279.

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SIMPSON, J.—This is an action brought by the appellee against the appellant to recover damages for an injury received by the plaintiff while working in the coal mine of the defendant. The first assignment insisted on is to the action of the court in overruling the demurrer to the third count of the complaint. Said third count claims that the injury was received as the result of certain rocks or slate falling on the plaintiff. It is alleged that “it was the duty of the defendant to employ, as fellow servants of the plaintiff, men who were reasonably skilled in and about the duties they were to perform, who were competent, and who were careful; but the defendant violated its duty to plaintiff in this respect, and negligently employed and placed in the same room with the plaintiff one Martin Sharrat, who was not reasonably skilled in the duties he was to perform, or who was incompetent and careless,” and “as a proximate result of such employment of said Martin Sharrat, as alleged, he received the injuries above set out.”

The law is that in order to recover against the master, on account of the employment of incompetent servants, it must be shown that the master knew of the incompetency of said servant, or by the exercise of reasonable diligence could have ascertained that fact.—1 Labatt, Master & Servant, pp. 418, 419, § 193a; Bailey's Master's Liability for Injuries to Servants, pp. 48-50; 26 Cyc. 1298, 1299; *First Nat. Bank v. Chandler*, 144 Ala. 286, 308, 39 South. 822, 113 Am. St. Rep. 39. It is also, laid down, as a general proposition, that the complaint must allege that the master knew of the incompetency, or by the exercise of reasonable care could have known; but it is not necessary that those exact words should be used. Under the general trend of our own and other decisions, we hold that the allegations in this

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complaint, that the "defendant violated its duty in this respect and negligently employed," etc., are a sufficient compliance with this requirement.—25 Cyc. 1393, 1393; *Galveston Rope & Twine Co. v. Burkett*, 2 Tex. Civ. App. 308, 21 S. W. 958. While the case of *A. G. S. R. R. Co. v. Vail*, 142 Ala. 135, 38 South. 124, 110 Am. St. Rep. 23, is not strictly analogous, as the complaint there was for not furnishing a sufficient number of men to do the work, and the complaint did allege that the defendant negligently failed, etc., the point was not raised by demurrer. In the case of *T. C. I. & R. R. Co. v. Bridges*, 144 Ala. 229, 237, 38 South. 902, 113 Am. St. Rep. 35, we held a count bad because it did not show "that the master was guilty of negligence in the selection of a servant." The case of *Conrad v. Gray*, 109 Ala. 130, 19 South. 398, merely holds a count sufficient which alleged that the defendant employed the servant "with knowledge of his inexperience," etc. See, also, *Laughran v. Brewer*, 113 Ala. 509, 514, 515, 21 South. 415. The court did not err in overruling the demurrer on this ground.

Upon the other ground of demurrer, to the effect that the causal connection between the incompetency of said Sharrat and the injury is not shown: Under the very liberal (if not lax) rules laid down by this court, by which mere general averments, without stating the *quo modo*, or the acts constituting the negligence, are held sufficient, this count is not liable to that cause of demurrer either.

The court erred in refusing to give charge No. 1, requested by the defendant. No causal connection is shown between the incompetency of Sharrat (if that was proved) and the injury. The evidence shows that the plaintiff himself had direction of the work, and it is not shown that he or any one else suggested the necessity of propping the place before the injury, nor that any duty rested on Sharrat in regard to that matter.

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The court erred in refusing to give charge No. 3, requested by the defendant. The fourteenth count claimed damage because of the defendant's failure to furnish a safe place to work. A failure to furnish timber would not answer the allegations of that count.

The evidence shows that the plaintiff and one Banks were employed, under contract, to do a certain work, to wit, to drive or run a heading in the air course at a stipulated price per yard; that for some reason, not shown, one Sharrat was temporarily substituted by defendant for Banks; that said parties furnished their own laborers to assist in the work. It is not shown that there was anything dangerous in the place assigned for them to work in. It is not shown that the defendant was under any obligation to prop the place where the work was done; but, on the contrary, the evidence is that plaintiff was to do that himself. The only intimation in the evidence is that if the place had been propped, at the stage of the work when the injury was received, the injury might have been avoided; but the plaintiff himself testifies that he is an experienced miner, that he examined the place and did not discover that the overhanging rock was loose, also that he did not think he needed any timber. It is not shown that he made any request for timber except that he ordered some timber (for what purpose not stated) about two hours before the injury, and continued to work without it. Consequently charge 5, also, should have been given.

The questions to the witness Banks, tending to show that the superintendent, Brown, was not familiar with the working inside the mines, should have been excluded, as Brown's superintendence was shown by the evidence to relate only to the work outside the mines.

The testimony of the witness Banks as to the proper way to drive a heading, and as to the manner in which

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this had been done, should have been excluded. In the first place, the witness was not shown to be an expert. In the next place, this testimony related to work done by Jetton and Sharrat, after the injury, and had no tendency to show whether the failure to prop the place before had any causal connection with, or was due to, Sharrat's incompetency.

The question to the witness Rodgers as to whether Sharrat was (as shown by his work) a careful or a careless minor should have been excluded. The question to be determined was whether he was competent.

The judgment of the court is reversed, and the cause remanded.

Reversed and remanded.

DOWDELL, C. J., and DENSON and MAYFIELD, JJ., concur.

Chamberlain v. Southern Ry. Co.

Damages for Death of Employee.

(Decided Jan. 18, 1909. Rehearing denied Feb. 16, 1909.
48 South. 703.)

1. *Master and Servant; Injuries to Servant; Common Law Duty of Master.*—At common law, the master was charged with the non delegable duties to furnish proper machinery and materials for the work, to employ competent servants only, and to make proper rule and establish proper methods of work.

2. *Same; Railroad; Loading Cars.*—A railroad company is bound to a reasonable care in the proper loading of its cars so as not to cause injury to its servants.

3. *Same; Negligence; Burden of Proof.*—The burden is on the servant to establish the master's negligence, in an action by the servant against the master for injuries to him.

4. *Same; Negligence; Res Ipsa Loquitur.*—The evidence in this case stated and examined and held sufficient to establish a prima facie case of negligence on the part of the railroad under the doctrine of *res ipsa loquitur*.

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5. *Same; Negligence of President or Directors.*—Where the action is against a railroad for damages for death of an employee, and the action is in case and not in trespass. It is not essential to plaintiff's right of recovery to show that the president or board of directors of the railroad actually participated in the damnyfing act.

(Dowdell, C. J., Simpson and Sayre, JJ., dissent.)

APPEAL from Mobile Law and Equity Court.

Heard before Hon. SAFFOLD BERNEY.

Action by Bart B. Chamberlain, administrator, against the Southern Railway Company, for the death of his intestate. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

The complaint contains several counts, all of which were eliminated by demurrer, except the second count, which, as last amended, is as follows: "Plaintiff claims of defendant \$5,000 damages, for that on the 13th day of October, 1906, the defendant was then and there a public common carrier, and operating a railroad in the city of Mobile, which ran to other points without the city of Mobile, and plaintiff's intestate, Major Brown, was then and there a laborer in the service of defendant's company; that while said Major Brown was in the employment of defendant, and as a part of the duties thereof, he was put to work to unloading a cereain box car for the defendant in the city of Mobile, loaded with bales of cotton, and pursuant to said work he was instructed to open a sliding side door of said box car, and while in the act of so opening the same, and before he could get away from the place where the said act of opening occurred, a bale of cotton of large weight, to wit, approximately 500 pounds, fell out of said car upon him, and mashed and crushed him so that his death was caused thereby; that it was the duty of the defendant company to exercise reasonable care to so load or cause to be loaded the bales of cotton in said box car that, when the door was open, said cotton would not fall out

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of said car and injure any employe opening said door, but defendant negligently violated said duty, and as a proximate result thereof the said Major Brown was crushed by said falling cotton bale and killed."

It was dmitted that plaintiff's decedent was killed by a falling cotton bale while engaged in the services of defendant. The evidence for the plaintiff further tended to show the nature of the injuries received from which the death resulted. The evidence further tended to show that, when Brown was killed, he and John Friend were opening a car; that the instruction for opening the car came from Mr. Thomas, who was in the employment of the defendant company, and was boss over the men, and that the order from him was to open the car—to shove open the door; that when the door was shoved open Friend stepped back a little, but that Brown was right in front of the door, and as he stepped on the platform the bale came right over and caught him, crushing him. Brown had just started to work for the defendant that morning, while Friend had been working for about a year. The car was loaded with cotton, two bales deep, one bale setting on the end on top of another. The bale did not fall as soon as the door was held open, but fell as Brown turned around to step on the platform. This all happened in the city of Mobile on the premises of the defendant. It was further shown that there was a spring in the middle of the doors which released the doors of the car, and as the door passed open the bale tilted and fell out. It was further shown that nobody pulled the bale of cotton to give it a start; that the bales of cotton were not pinned or tied together, or fixed in any way; and that there were no boards nailed across the door to prevent them from falling out, nor was there any other precaution taken to prevent the same. On motion of the defendant

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the court excluded all the evidence offered by the plaintiff on the ground that it failed to make out a case under the second count.

R. W. STOUTZ, and ROACH & CHAMBERLAIN, for appellant. There is no merit in the appellee's motion to strike the bill of exception.—Section 3107, Code 1907; *Downs v. Minchew*, 30 Ala. 86, and cases there cited; *Douglass v. M. & P. W. R. R. Co.*, 37 Ala. 640. The court erred in sustaining demurrers to the complaint as originally filed.—*N. Ala. Ry. Co. v. Mansell*, 138 Ala. 549; *Ga. Pac. v. Davis*, 92 Ala. 300; *N. Ala. Ry. Co. v. Shea*, 142 Ala. 119; *U. P. v. Snyder*, 152 U. S. 684; 26 Cyc. 1125. The exact question of the duty of the railroad company to load its cars safely or provide an inspection designated to safeguard employes whose duty brings them in contact with loaded cars, is settled.—*Lucas v. Southern Ry. Co.*, 57 S. E. 1041; 54 Kan. 21; 37 N. E. 43; 34 S. W. 595; 29 C. C. A. 374; 52 N. E. 527; 12 L. R. A. 454. The court also erred in sustaining demurrers to the third, fourth, fifth and sixth counts of the complaint.—*Reiter-Connelly Co. v. Hamlin*, 144 Ala. 192; *Sloss-Sheffield S. & I. Co. v. Holloway*, 144 Ala. 280, and authorities there cited; *L. & N. v. Jones*, 130 Ala. 456; *Ill. Car Co. v. Walsh*, 132 Ala. 490; *Southern Car Co. v. Bartlett*, 137 Ala. 240. The amendments were within the *lis pendens* and were not barred.—*A. G. S. v. Chapman*, 83 Ala. 453; *A. G. S. v. Arnold*, 80 Ala. 604; *L. & N. v. Woods*, 105 Ala. 561; *R. R. Co. v. Campson*, 112 Ala. 425; *L. & N. v. Robinson*, 141 Ala. 325. This question cannot be presented by demurrer, but must be raised by plea or motion.—*Springfield F. M. I. Co. v. DeJarnette*, 111 Ala. 248; *Turner v. Roundtree*, 30 Ala. 706. The court erred in sustaining demurrers to the 7th count originally and as amended, to the eighth, orig-

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inally and as amended, to the 9th, 10th and 11th.—*Ford v. L. S. & M. S. R. R. Co.*, 124 N. Y. 493; *L. & N. v. York*, 128 Ala. 305; *Lucas v. Southern Ry. Co. supra*; *Crawford v. United Ry.*, 70 L. R. A. 489; *Sloss Steel & I. Co. v. Tillson*, 141 Ala. 152; *Southern Car & Foundry Co. v. Jennings*, 137 Ala. 255; *Jackson L. Co. v. Cunningham*, 141 Ala. 206. The failure to prove the allegation of want of care was not fatal.—*Rogers v. DeBardelaben C. & I. Co.*, 97 Ala. 155; Ency of Evl. 800. Especially, is this true when the fact is peculiarly within the knowledge of the adversary party.—*Loeb v. Huddleston*, 105 Ala. 357; *Rogers v. DeBardelaben, supra*.

BESTOR, BESTOR & YOUNG, for appellee. Counsel insist that the rulings of the court on the pleading cannot be considered and moved to strike the assignments of error based thereon. They cite.—Section 3017, Code 1907; *Mathis v. Oates*, 57 Ala. 112; *Perry v. Dana*, 74 Ala. 485; *Sands v. Hickey*, 135 Ala. 325; *Laster v. Blackwell*, 128 Ala. 145; 21 A. & E. Ency of Law, 547; *Hurst, et al. v. Bell & Co.*, 72 Ala. 339.

ANDERSON, J.—Under the common law the master is responsible for his own negligence and want of care and this may appear from his failure to furnish proper machinery and materials for the work, or from the employment of incompetent servants, or from a failure to make proper rules or establish a proper method for the conduct of his business. As to such acts the agent occupies the master's place, and the latter is deemed present and liable for the manner in which they are performed.—*Ford v. Lake Shore R. R.*, 124 N. Y. 493, 26 N. E. 1101, 12 L. R. A. 454. "It is the duty of a railroad company to use reasonable care to see that its cars are properly loaded, so as not to cause injury to its servants."

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26 Cyc. 1124; *Austin v. Fitchburg R. R.*, 172 Mass. 484, 52 N. E. 527; *George v. Clark*, 85 Fed. 608, 29 C. C. A. 374; *McCray v. G. H. & L. R. R.*, 89 Tex. 168, 34 S. W. 95.

The gravamen of the second count of the complaint is the negligent failure of the defendant to load or cause to be loaded the car in question. There was no direct proof that the defendant caused the car to be loaded, but the evidence afforded an inference from which the jury could find a responsibility for the loading. Nor was there any proof of negligence, apart from what might be reasonably presumed by the jury from the circumstances connected with and surrounding the injury; and this case, therefore, presents for consideration the maxim: "Res ipsa loquitur." The affair speaks for itself. The burden of proof rests on the plaintiff upon the issue of negligence; and it is a general rule that, when a servant sues his master or employer for damages arising from injuries caused by the negligence of the latter, the plaintiff must prove the negligence of the defendant, and the proof of the accident and injury alone will not be sufficient to establish negligence. However, it is well settled that the circumstances attending the injury may be sufficient to establish negligence, without any direct proof thereof.—*Western Steel Co. v. Cunningham*, 158 Ala. 369, 48 South. 109; *Tenn. Co. v. Hayes*, 97 Ala. 201, 12 South. 98; *McCray's Case*, *supra*. We think the circumstances shown, in connection with the injury and accident, in the case at bar, were such as to authorize the jury to draw an inference of negligence on the part of the defendant in and about loading the car. The car was in the possession of the defendant, and was being unloaded on its track by the direction of its agent. If it had nothing to do with the loading, or was not otherwise

responsible for same, or the injury was proximately caused by the negligence of the plaintiff's fellow servant, rather than from an imperfect system or custom of the defendant as to loading cars, then these facts were peculiarly within the defendant's power of production.—*Austin v. Fitchburg, supra.*

The trial court erred in excluding the plaintiff's evidence, upon the assumption that he did not make out a case for the jury. It is intimated in brief of counsel that the trial court proceeded upon the theory that the president or board of directors were not shown to have actually participated in the damnifying act as required in the case of *City Delivery Co. v. Henry*, 139 Ala. 161, 34 South. 389. The second count, in the case at bar, is unlike the ones to which the rule was applied in the foregoing case. The counts in said case charged a direct corporate trespass, while the count here is in case.

The judgment of nonsuit is set aside, and the judgment rendered against the plaintiff for cost is reversed, and the cause is remanded.

Reversed and remanded.

DENSON, McCLELLAN, and MAYFIELD, JJ., concur.

On Rehearing.

ANDERSON, J.—This application was considered after Justice HARALSON, one of the concurring justices, had vacated the bench. The writer, with Justices DENSON, McCLELLAN, and MAYFIELD, are of the opinion that the opinion is correct, and that the application should be overruled, which is accordingly done.

DOWDELL, C. J., and SIMPSON and SAYRE, JJ., are of the opinion that the proof did not make out a prima facie case, and that the action of the trial court in excluding same should not be reversed, and think that the application for rehearing should be granted, and the case affirmed.

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Sloss-Sheffield Steel & Iron Co. v. Green.

Action for Damages for Injury to Employee.

(Decided April 15, 1909. 49 South. 301.)

1. *Master and Servant; Injury to Servant; Negligence of Superintendent.*—To support an action under subdivision 2, section 3910, Code 1907, the evidence must show that the employe whose negligence is alleged had superintendence entrusted to him, and that the injury was caused by his negligence while in the exercise of such superintendence.

2. *Same; Evidence.*—The evidence in this case examined and stated and held to show that the person charged with negligence was entrusted with superintendence over the mines and miners within the purview of subdivision 2, section 3910, Code 1907.

3. *Same.*—It is negligence in one entrusted with superintendence over the mines and miners as to the safety thereof, to create or allow a condition therein to exist that will render an accident probable through the means of an intervening agency which might have been foreseen with due care.

4. *Same.*—The evidence in this case stated and examined and held to support a finding that the foreman charged with the condition of the mines was so negligent as to authorize a recovery under subdivision 2, section 3910, Code 1907.

5. *Same; Statutes; Construction.*—Section 1021, Code 1907, does not require the miners to prop or look after the safety of entries to the miner, but rests that duty on the operator of the mines.

6. *Same; Injury to Servant; Safe Place to Work.*—The entry of a mine is a place which the operator furnishes and in respect to which he must exercise reasonable care to keep safe, and the employe may rely on the operator performing his duties in reference thereto.

7. *Evidence; Conclusion.*—A question to a coal miner as to whose duty it was to inspect and keep up the roof of the entry of the mine calls for a fact and not for the conclusion of a witness.

8. *Same; Competency of Witness.*—It is the duty of one desiring to know upon what foundation a witness will base his answer as to the duty to inspect and keep up the roof of the entry of the mine to interrogate the witness upon that subject before permitting the witness to answer the question, and if such examination reveals the lack of knowledge on the part of a witness, the court should sustain an objection to the question.

9. *Same; Opinion Evidence; Expert Evidence.*—The question as to whether or not the proper inspection of the coal mine entrance would detect the loose condition of the roof before the falling of the rock

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is a proper one for expert evidence, and one who has dug coal for fifty-five years and for twenty years of that time has been a miner of coal in Alabama, is qualified to testify as an expert.

10. *Appeal and Error; Harmless Error; Erroneous Admission of Evidence.*—It is not prejudicial error to permit a witness to testify as to a matter that the court could determine to be true as a matter of law.

APPEAL from Jefferson Circuit Court.

Heard before Hon. A. O. LANE.

Action by Robert Green, an employe, against the Sloss-Sheffield Steel & Iron Company, for damages caused to his person by a rock falling from the roof of the entry of a mine. Judgment for plaintiff and defendant appeals. Affirmed.

TILLMAN, GRUBB, BRADLEY & MORROW, and L. C. LEADBEATER, for appellant. The court erred in permitting Mason to answer the question as to whose duty it was to inspect and prop and keep up the roof of the entry in that mine.—*Ward v. Shirley*, 131 Ala. 568; *Alexander v. Handley*, 96 Ala. 220; *M. & W. R. R. Co. v. Edwards*, 41 Ala. 667. Counsel discuss other assignments of error, relative to the evidence, but without citation of authority. They insist that the court erred in refusing the 2nd charge requested by the defendant.—*Pioneer M. & M. Co. v. Smith*, 146 Ala. 234, and cases there cited.

BOWMAN, HARSH & BEDDOW, for appellee. The court did not err in reference to the evidence.—*Woodstock Co. v. Reed*, 84 Ala. 493; *McGrew & Harris v. Walker*, 17 Ala. 824; 3 Mayf. Dig. 482; *Schlaff v. L. & N.*, 100 Ala. 377; 17 Cyc. 76. The court did not err in refusing the charge requested.—*Roche v. Lowell Bleachery*, 181 Mass. 481; *Osborn v. Jackson & Todd*, 11 L. R. C. B. 619; *K. C. M. & B. v. Burton*, 97 Ala. 240; *Robinson Mining Co. v. Tolbert*, 132 Ala. 462.

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DENSON, J.—This is an action by an employe against his employer to recover damages alleged as consequent upon a personal injury sustained by the employe while he was engaged in the performance of his duties, to wit, mining coal; such injury being caused by a part of the roof or top of the employer's mine falling upon him. The case is presented by a complaint containing three counts; but the second, having been charged out at the request of the defendant, is not before us. Indeed, it is not necessary to consider the cause in respect to any count other than the third count as amended. This count presents a cause of action under the second subdivision of section 1749 of the Code of 1896 (section 3910 of the present Code). The count ascribes the injury to the negligence of C. M. Parker whilst he was in the exercise of superintendence, in that he "negligently caused or allowed said part of said roof or top to fall upon or against plaintiff." At the conclusion of the evidence the defendant requested, in proper form, the general affirmative charge in respect to this count, which was refused by the court.

There can be no doubt that, under the count, to support the ruling of the court refusing the charge, it is essential that the evidence be such as to afford a reasonable inference, that Parker had superintendence intrusted to him, and that the injury was caused by his negligence whilst in the exercise of such superintendence.—*Drennen v. Smith*, 115 Ala. 396, 22 South. 442. "To hold otherwise would be to fasten liability on the master to the servant for that which is at most negligence of a fellow servant, having no greater power or authority than the servant who complains of the injury."—*City, etc., v. Harris*, 101 Ala. 564, 570, 14 South. 357; *Dantzler v. DeBardleben*, 101 Ala. 309, 16 South. 10, 22 L. R. A. 361. The testimony tends to show that C.

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M. Parker was defendant's "foreman, mine boss, or bank boss." One of the witnesses—a miner in the employment of the defendant at the time of the injury—testifying in this respect, said: "Mr. Parker was the defendant's mine foreman over us at that time." The plaintiff testified, substantially, that he entered into the employment of the defendant on the morning of the day on which he was injured, and that Mr. Parker, the mine boss, put him to work at the place where he was injured; that he had been at work only a short while when a large rock fell from the roof or top of the entry upon his leg and broke it.

There was other testimony in the record tending to show that the rock fell from the roof of the entry. The entry, as the evidence shows, was 8 feet wide and 5 feet 6 inches high, and extended at least 100 feet further into the mine, beyond the point where the plaintiff was put to work by the foreman. It is also shown, without conflict in the evidence, that it was the duty of the foreman or mine boss to inspect the roof of the entry; and the evidence tends to show that, by a proper inspection prior to the time the plaintiff was put to work, the foreman could have determined whether or not the roof of the entry was "loose or sound, before it fell." and, of consequence, whether or not any interference with conditions as they existed at the time and place, by mining, would probably cause any giving away of the roof.

On these tendencies of the evidence found in the record, and by the light of all our cases, we feel that we are on safe ground in holding that the evidence affords a reasonable inference of superintendency intrusted to Parker over both the miners and the mine, especially touching the condition of the mine—its safety or not.—*Culver v. Alabama Midland Railway Co.*, 108 Ala. 332, 18 South. 827; *Robinson v. Tolbert*, 132 Ala. 462, 31

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South. 519; *Seaboard Mfg. Co. v. Woodson*, 94 Ala. 143, 10 South. 87; *Bessemer, etc., Co. v. Campbell*, 121 Ala. 50, 61, 25 South. 793, 77 Am. St. Rep. 17. This being true, it would follow that it would be negligence for him to "create or allow such condition of things to exist" as would "render an accident probable through the means" even "of an intervening agency, which due care might have foreseen."—*Seaboard Mfg. Co. v. Woodson*, *supra*; *Lynch v. Allyn*, 160 Mass. 248, 35 N. E. 550; *Connolly v. Waltham*, 156 Mass. 368, 370, 31 N. E. 302; *McCauley v. Norcross*, 155 Mass. 584, 30 N. E. 464; *Malcolm v. Fuller*, 152 Mass. 160, 25 N. E. 83; *Dresser, Employer's Liability*, bottom of page 290.

We think the evidence, and tendencies of evidence, heretofore recited, sufficient to support reasonable inferences that Parker was chargeable with knowledge of the condition of the roof of the entry, or that it was his duty, in the exercise of reasonable care, to know its condition, and that he was guilty of actionable negligence, within the exercise of his superintendency, in putting the plaintiff to work at the place in question. See cases cited *supra*. Upon the foregoing considerations, the court holds that the affirmative charge was properly refused.

After it was shown, without objection and without conflict in the evidence, that it was the duty of the defendant company to inspect the roof of the entry in the mine, the plaintiff sought to prove by a witness (one Mason), who was a miner in the same mine, and in the employment of the defendant, at the time of the casualty in question, that it was the duty of the foreman or bank boss to inspect and keep up the roof of the entry, and for this purpose asked him this question. "In that coal mine whose duty was it to inspect and prop and keep up the roof in the entry? The question was ob

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jected to on the single ground that it called for a conclusion of the witness, and exception was reserved to the overruling by the court of the objection. We think the question called for the statement of a fact—collective facts, it may be—which, as a rule, witnesses may depose to. The presumption, from the question and the precedent testimony, is that the witness had knowledge of the fact inquired about. “If the defendant desired to know the foundation on which the witness rested his answer, he could and should have interrogated him on the subject.” By permission of the court he could have done so before the witness was allowed to answer the question; and, if his examination had revealed lack of knowledge of the fact inquired about, the court might have sustained the objection. A case very near in point, to the effect that the court did not err in overruling the objection to the question, is that of *Eureka etc., Co. v. Wells*, 29 Ind. App. 1, 61 N. E. 236, 94 Am. St. Rep. 259, bottom of page 265. See, also, *Richmond, etc., Co. v. Hammond*, 93 Ala. 181, 185, 9 South. 577; *Elliot v. Stocks*, 67 Ala. 290, 301; *Grantham v. Payne*, 77 Ala. 584; *McGrew v. Walker*, 17 Ala. 824; *First Nat. Bank v. Leland*, 122 Ala. 289, 296, 25 South. 195; *Street v. Sinclair*, 71 Ala. 110, 116; *Turnley v. Hanna*, 82 Ala. 139, 144, 2 South. 483; *Hood v. Disston*, 90 Ala. 377, 379, 7 South. 732.

The objections to the question propounded to the witness Griffith were also properly overruled. But a different question is presented by the objections made to the testimony elicited from the witness Chambers. He was not asked about the defendant's mine, nor any particular mine; but, after testifying that he had “dug coal” 55 years and had mined coal in Alabama for 20 years, he was asked: “Whose duty” it is “to keep up the roof of a coal mine along the entries—is it the duty of the

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miner or the company?" This question was objected to, upon the grounds of irrelevancy, immateriality, and incompetency of the evidence called for thereby; but the court overruled the objection, and witness answered: "It is the boss' place to keep up the roof." "Our statutes on the subject of mining indicate a public policy to the effect that mine owners and operators shall be charged with the duty of making their mines reasonably safe for miners; and miners themselves are also required in certain cases to look out for their own safety, as in propping the roofs of the rooms in which they work, the duty of furnishing the timbers being cast upon the company (Code 1896, § 2919; Code 1907, § 1021)." But there is no provision requiring the miners to prop or look after the safety of entries. That duty rests, therefore, on the owners or operators of the mines.

It has been seen that the undisputed evidence here shows that the entry extended 100 feet beyond the point where the plaintiff was injured. Therefore it was not a place which the employe furnished for himself, but was a place over which he had no control. For these reasons it must be considered to have been a place which the defendant furnished, and in respect to which the law imposed on defendant the duty to exercise reasonable care, to the end of keeping it safe; and in this view the employe had the right to rely upon the defendant having fulfilled or performed this duty.—*Eureka Co. v. Bass*, 81 Ala. 200, 8 South. 216, 60 Am. Rep. 152; *Taylor v. Star Coal Co.*, 110 Iowa, 40, 81 N. W. 249; *Wellston Coal Co. v. Smith*, 65 Ohio St. 70, 61 N. E. 143, 55 L. R. A. 99, 87 Am. St. Rep. 547, and authorities cited in Freeman's note on page 567, "G." According to these principles, and under the evidence, the court was authorized to consider it a question of law—that it was the duty of the company to keep the roof of the entry in a rea

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sonably safe condition. Therefore it must follow that no injury could possibly have accrued to the defendant from allowing the questions in this respect to be propounded to the witness Chambers.

In the light of the testimony, we think the subject-matter of the last question propounded to Chambers, "Where an entry has been driven and stood for a long time, and rock falls in the entry from the top of the entry, tell the jury whether or not, if a proper inspection is made by the boss, the top can be detected to be loose or sound before it falls," one upon which expert testimony might be given. Chambers was unquestionably shown to be qualified to testify as an expert on the subject, and the court committed no error in overruling the objections to the questions.

Error prejudicial to the plaintiff not having been shown, the judgment will be affirmed.

Affirmed.

DOWDELL, C. J., and SIMPSON and MAYFIELD, JJ., concur.

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Action for Damages for Injury to Employee.

(Decided Jan. 21, 1909. Rehearing denied Feb. 16, 1909.
48 South. 664.)

Master and Servant; Pleading; Injury to Servant; Complaint.—

A complaint which alleges that the defendant was operating a coal mine and that on a certain day, while plaintiff was in pursuance of said employment in the service and employment of defendant and engaged in and about said business of defendant, while riding on a tram car of said defendant, which was being lowered in said mines by means of a wire rope or cable, said wire rope or cable broke, and as a proximate consequence plaintiff was injured, is good against de-

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mutter that it fails to show that the injuries were received while plaintiff was performing duties in accordance with his service or employment, or that he was injured while in performance of duties which he was employed to do.

(Dowdell, C. J., Simpson and Anderson, JJ., dissent.)

APPEAL from Birmingham City Court.

Heard before Hon. H. A. SHARPE.

Action by Dan Chamblee, against the Sloss-Sheffield Steel & Iron Company. From a judgment for plaintiff defendant appeals. Affirmed.

The amended complaint was in the following language: "The plaintiff claims of the defendant \$3,000 as damages, for that heretofore, to wit, on the 5th day of January, 1906, the defendant was operating a coal mine, known as the 'Bessie Coal Mine,' in Jefferson county, Ala.; that on said day while plaintiff was, in pursuance to said employment, in the service and employment of defendant, and engaged in and about said business of defendant while riding on the tram car of said defendant, which was being lowered in said mine by means of a wire rope or cable, said wire rope or cable broke and gave way, and as a proximate consequence thereof plaintiff fell or was cast from said car, and his right eye and other parts of his body were bruised, cut, and otherwise injured, and his left hip, foot, and knee permanently injured, and he lost much time from his work, and suffered much mental anguish and physical pain; and plaintiff alleges that said wire rope or cable broke or gave way as aforesaid, and plaintiff suffered such injuries and damages, by reason of and as a proximate consequence of a defect in the condition of the ways, works, machinery, or plant used in or connected with the said business of the defendant, which said defect arose from, or had not been discovered or remedied owing to, the negligence of the defendant, or of some person in the service or employment of defendant and

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intrusted by it with the duty of seeing that said ways, works, machinery, or plant were in proper condition. Said wire rope or cable was old, worn, cracked, rusty, weak, insecure, or otherwise defective."

The following demurrers were filed to this complaint: "(1) It fails to show the said injury was received while plaintiff was performing his duties under his service or employment. (2) It does not aver that plaintiff was injured while in the performance of the duties which he was employed to do. (3) It does not show that defendant violated any duties it owed to plaintiff. (4) The alleged defect is not sufficiently set forth in the complaint."

There was judgment for plaintiff in the sum of \$250.

TILLMAN, GRUBB, BRADLEY & MORROW, and CHAS. RICE, for appellant. The court erred in overruling appellant's demurrers to the 2nd count.—*G. P. R. R. Co. v. Propst*, 85 Ala. 205. The court erred in refusing the charge requested by appellant.—*Wilson v. L. & N. R. R. Co.*, 85 Ala. 273.

JOSEPH P. COLLINS, JR., for appellee. The 2nd count was sufficient.—*Birm. Rolling Mills v. Rockhold*, 143 Ala. 127. The court did not err in reference to the charges given and refused.

SIMPSON, J.—This action was brought by the appellee against the appellant to recover damages for an injury claimed to have been received by the plaintiff by the breaking of a wire rope while the plaintiff was at work in a coal mine belonging to the defendant.

The first assignments insisted on relate to the overruling of demurrers to the complaint as amended. Said complaint states only inferentially that the plaintiff

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was employed at all, and only that he was "engaged in or about said business of the defendant." It does not state that he was engaged in or about the "particular service" required by his employment. This court has said that under our statute the party claiming damages must be an employe, at the time of the injury, by contract, express or implied, binding on defendant, and the injury must be received while rendering the service required by the particular employment.—*Ga. Pac. R. R. v. Propst*, 85 Ala. 203, 205, 4 South. 711. This point was not presented by demurrer in the case of *Birmingham Rolling Mill Co. v. Rockhold*, 143 Ala. 115, 42 South. 96. The court erred in overruling said demurrer.

There was no error in the refusal of the court to give the fourth charge requested by the defendant. There was testimony tending to show that it was a part of the duties of the plaintiff to ride down with the empty cars, and the mere fact that he had been out of the mine for the purpose of getting his dinner did not change the fact that he was on duty in going down with the empty cars afterward.—*Birmingham Rolling Mill Co. v. Rockhold*, 143 Ala. 116 (7th h. n.), 127, 42 South. 96.

The remark quoted by counsel for appellant, from the case of *Wilson v. L. & N. R. R. Co.*, 85 Ala. 273, 4 South. 701, referred to the question of contributory negligence of an employe in descending from the top of a car for his own purpose, and not for any necessary purpose, by way that was obviously dangerous, when there was a safe way open to him.

The judgment of the court is reversed, and the cause remanded.

DOWDELL, ANDERSON, and DENSON, JJ., concur.

[Huggins v. Southern Ry. Co.]

On Rehearing.

PER CURIAM.—The majority of the court, consisting of **DENSON, McCLELLAN, MAYFIELD, and SAYRE, JJ.**, hold that the amended count was sufficient. The case is accordingly affirmed.

DOWDELL, C. J., and SIMPSON and ANDERSON, JJ., dissent.

Huggins v. Southern Ry. Co.

Action for Damages for Injury to Employee.

(Decided April 20, 1909. 49 South. 299.)

1. *Master and Servant; Injury to Servant; Contributory Negligence.*—As an answer to a suit against the master for injuries done the employe a plea setting up contributory negligence is demurrable if it fails to set forth the facts constituting the negligence.

2. *Same; Rules; Operation and Effect.*—Where the master does not furnish cars with such appliances or other means to enable a compliance with its rules by its employes, the rule furnishes no protection to the master.

3. *Same; Action; Directing Verdict.*—Where there is evidence from which a jury could infer initial negligence on the part of the servant and evidence from which the jury could infer subsequent proximate negligence on the part of the master after the servant got in a dangerous position, the affirmative charge should not be given.

4. *Pleading; Special Plea; General Issue.*—Special pleas setting up matters which are cognizable under the plea of general issue, are demurrable where the general issue is interposed.

5. *Same; Demurrers; Grounds.*—Demurrers to special pleas are properly overruled where they fail to point out the infirmities in pleadings.

6. *Evidence; Lost Instrument; Secondary Evidence.*—Secondary evidence of the contents of a lost instrument is not admissible until the loss and search for same has been shown by each and every custodian thereof.

APPEAL from Bessemer City Court.

Heard before Hon. **WILLIAMS JACKSON.**

[Huggins v. Southern Ry. Co.]

Action by Joseph Huggins against the Southern Railway Company for personal injuries. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

For pleading and facts on former appeal in this case, see *Huggins v. Southern Ry. Co.*, 148 Ala. 153, 41 South. 856.

The second plea is as follows: "Plaintiff himself was guilty of negligence, which proximately contributed to cause his injury, in that he negligently allowed his hand or arm to be caught between the dead block or other appliances on the end of said car while the same was being coupled." Plea 10 was interposed to all counts of the complaint as amended, except counts 4, 6, and 8, and sets up contributory negligence on the part of the plaintiff in going between said cars and remaining there until they came together, when it was obviously dangerous for him to do so by reason of the fact that one of said cars were being rapidly backed up in order to effect a coupling. Plea 11 was filed to the same counts as plea 10, and sets up the same negligence as in plea 10, with allegation that the plaintiff assumed the risk.

The demurrers to the second plea were: "First, that it is no answer to the count setting up wanton or willful injury; second, because matters therein set up could be shown under the general issue; third, because it fails to show or aver in what manner said plaintiff was negligent in allowing his hand or arm to be caught between the dead blocks or other appliances; and, fourth, because it states a mere conclusion of the pleader." The demurrer to the tenth plea was as follows: "Said plea fails to aver or show that plaintiff was guilty of gross or reckless negligence in going between said cars when plaintiff had been ordered to do so, and is therefore no answer to the second count of the complaint." To the

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eleventh plea, that said plea is no answer to any count of the complaint, because it sets up the conclusions of the pleader, and fails to aver or show any fact or facts that would show that the arm of the plaintiff was in such position as it would likely be caught and mashed.

Replications 3 and 9 to the twelfth plea were as follows (the twelfth plea sets up the contract which is set out in a former report of this case in reference to coupling with a stick, and alleges a violation by plaintiff of said contract and the rules contained therein, by going in between the cars to make said coupling while one of said cars was in motion, or had an engine attached to it): (3) "Plaintiff says that the coupling he was making or attempting to make at the time could not be made with a stick; that he was required by the defendant, and it was necessary for the plaintiff, to make such a coupling in the course of his employment, and it was his duty to do so; that he had been ordered to make said coupling as averred in the complaint, and it was necessary to go in between the cars to make such coupling." (9) "That the coupling plaintiff was making at the time of the injury could not be made without going between the cars; that plaintiff had been ordered by his superior employe, Porterfield, to make said coupling, and in order to do so it was necessary to go in between the cars; and plaintiff avers that said Porterfield, as the representative of the defendant, and as agent of the defendant, had the authority to order a violation of the rules set up in said plea, and whose orders plaintiff avers it was his duty to obey under his employment."

The demurrers to the third replication were as follows: "Said replication is no answer to defendant's plea of contributory negligence on plaintiff's part, charging that in violation of his contract he went in between the moving cars to couple them. (2) It fails to show

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that the order given plaintiff to make the coupling was given by any person having authority to waive defendant's rule prohibiting employes from going in between moving cars to couple or uncouple them."

ESTES, JONES & WELCH, for appellant. The court should have sustained the demurrer to the 2nd plea.—*Creola L. Co. v. Mills*, 42 South. 1019; *L. & N. R. R. Co. v. Markee*, 103 Ala. 160. The court should have sustained the demurrer to the 8th plea, as well as the 3rd, 5th and 6th pleas.—Authorities *supra*. The court erred in sustaining demurrer to the 10th replication.—94 Ala. 552. The court also erred in sustaining demurrer to the 13th and 14th replication.—*Hissong's Case*, 97 Ala. 187. Counsel insist that the court erred in reference to the admission of evidence as to the contract and the manner of its execution.—80 Ala. 314; 76 Ala. 243; 8 Ency of Evi. 354; 105 Ala. 393; 95 Ala. 294; 98 Ala. 481. The court erred in giving the general charge for the defendant.—*Huggins v. Southern Ry. Co.*, 41 South. 856; *Southern Ry. Co. v. Guyton*, 122 Ala. 241; *Ala. Mid. v. McDonald*, 112 Ala. 217; *L. & N. v. Pearson*, 97 Ala. 211; *Cent. of Ga. Ry. Co. Case*, 124 Ala. 172.

WEATHERLY & STOKELY, for appellee. No brief came to the Reporter.

ANDERSON, J.—As the record shows that all of the appellant's demurrers to the defendant's special pleas, upon which there was a ruling, were sustained, except as to pleas 2, 10, and 11, we shall only consider the demurrers to these pleas, notwithstanding counsel in their brief argue the case as if their demurrers were overruled as to other pleas.

The trial court erred in not sustaining the demurrer to the second plea. It failed to set up the facts consti-

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tuting contributory negligence, and was subject to the second ground of demurrer on page 17 of the record.

While we do not wish to be understood as holding that pleas 10 and 11 are good pleas, their infirmity was not pointed out by the demurrers interposed thereto.

The plaintiff got the full benefit of the second replication to the twelfth plea under the fourth and eighth replications thereto.

When the authorities declare that rules of railroads forbidding going in between cars to make a coupling and requiring the use of sticks, etc., are "reasonable" and "wholesome," it is with the qualification or understanding that the duties required may be performed consistently with the rule. If the master fails to furnish such cars and appliances or other means to enable a compliance with the rule in order to discharge the required duty, the rule will afford no protection, if the duty imposed necessitates its nonobservance.—*M. & C. R. R. v. Graham*, 94 Ala. 552, 10 South. 283. The trial court erred in sustaining demurrers to the plaintiff's replications 3 and 9 to the defendant's twelfth plea.

The trial court erred in giving the affirmative charge for the defendant. There was not only proof from which the jury could infer initial negligence on the part of the defendant's servants, but from which they could infer proximate negligence subsequent to plaintiff's going between the cars, even if he negligently did so. There was some proof that Porterfield knew that the plaintiff was between the cars, and that he was signaling the engineer at the time of and just before the injury, and could have avoided the said injury by giving stop or checking signal. There was also proof that the train was backed at a rapid and unnecessary rate of speed, and that the engineer knew that plaintiff was, at the time, between the cars. True, he may not have

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actually seen him between the cars; but there was proof that he was looking back, and could see the plaintiff when standing on the outside. Then, if he disappeared, the jury could infer that the engineer knew he had gone between the cars. If he knew he was between the cars, and he ran the train back at a high and unnecessary rate of speed, it was for the jury to determine whether or not it was negligently backed, and whether or not said negligence, if any there was, was the proximate cause of the injury notwithstanding plaintiff may have negligently gone between the cars.

There seems to have been considerable quibbling over the attempt to prove the contents of the contract as set out in the sixth plea. As this case must be reversed, we need not determine whether or not the trial court committed reversible error in this particular; for, if the original is not found by the next trial, the loss and search for same should be shown by each and every custodian thereof before the admission of secondary evidence.

The judgment of the city court is reversed, and the cause is remanded.

Reversed and remanded.

DOWDELL, C. J., and McCLELLAN and SAYRE, JJ., concur.

[Anniston Electric & Gas Co. v. Rosen.]

Anniston Electric & Gas Co. v. Rosen.

Damages for Injury to Person on Track.

(Decided Feb. 4, 1909. 48 South, 798.)

1. *Street Railroads; Use of Street.*—Travelers in public streets and street cars operated therein have equal rights, and in the exercise of the common right by each, the streets must be so used as not to unreasonably hinder or endanger either.

2. *Same; Care Required of Operator.*—While the operator of a street car in a public street may assume that apparently adult persons, or property under their control, will leave the track in time to avoid injury, such operators can not rely on such assumption beyond the point where prudence would suggest the stopping of the car on reasonable appearance of the inability of the traveler to get out of danger, since the duty is on the operator to keep a lookout for persons on track and to so operate the car that it may be stopped and injury averted to person or property on the track.

3. *Same; Care Required of Travelers.*—One traveling on a street on which cars are operated has the duty to lookout for them, and when the street is obstructed, should listen and in some instances stop.

4. *Same; Injuries of Persons on Track; Evidence.*—Where the breach of duty relied on was the failure to employ proper means to avert the injury after a discovery of the traveler's peril, knowledge of the peril before injury must be shown; and this is not done by mere proof of a breach of duty to look for persons in peril regardless of the place where the injury occurred, in the absence of proof of wilfulness or wantonness.

5. *Same; Liability.*—Where a traveler whose peril and inability to extricate himself therefrom could have been discovered by the motorman, had he kept a lookout, his failure to keep a lookout for travelers on the street, was the proximate cause of the injury, aside from wantonness or willful misconduct.

6. *Same; Contributory Negligence.*—Where the injury was occasioned by the mere failure of the motorman to keep a proper lookout for travelers on the track, the contributory negligence of the traveler will defeat a recovery.

7. *Same.*—Where the motorman of a car, after discovery of the traveler's peril, failed to exercise proper care, the initial negligence of the traveler became only a condition raising the duty to avert the injury, and his breach of duty became the proximate cause of the injury, authorizing a recovery, unless the traveler was guilty of contributory negligence, concurrently with or subsequently to the negligence of the motorman.

8. *Same; Complaint.*—Actual knowledge of plaintiff's peril is necessary to a recovery against defendant for a failure to exercise

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reasonable care after a discovery of peril; therefore, a complaint alleging that plaintiff's position of peril was known to the motorman, or by the exercise of reasonable care could have been known to him, and that by the use of such means at hand, the motorman could have stopped the car in time to have prevented the collision, is in the alternative, and does not amount to a charge of actual knowledge.

9. *Same.*—A count charging simple negligence, a negligent failure to take means to avert injury after discovery of peril and wantonness or willfulness, is inconsistent. Count 2 is subject to this criticism.

10. *Same.*—A count alleging that plaintiff was rightfully at the crossing where a great many people were accustomed to pass, and averring that it was the duty of the motorman to so operate his car that it might be under such control as to be stopped before striking one on the track, and that the car was negligently operated at a reckless speed so that the motorman was unable to bring the car to a stop before the collision, charges simple negligence, anterior to a breach of duty raised by the discovery of peril.

11. *Same; Defenses; Contributory Negligence.*—A plea alleging that defendant negligently drove on the track ahead of the car, that the street was wide enough for plaintiff to have driven on either side of the track without injury, that the car was in plain view, and that plaintiff could have stopped until the car passed, etc., is a sufficient plea of contributory negligence available as a defense to a complaint charging simple, anterior negligence, but does not state a defense to a complaint based on the failure of the motorman to exercise proper care after discovery of peril.

12. *Same; Complaint; Sufficiency.*—A complaint alleging negligence of the company in general terms, without averring the name of the negligent servant, is sufficient.

13. *Negligence; Discovered Peril.*—Whether the person injured is a trespasser or not, the principle of negligent breach of duty after discovery of peril is the same, and in each case, knowledge of the peril requires the use of all known means to avert injury.

14. *Same; Wilfulness and Wantonness.*—When applied in cases of injury to a person by a breach of duty where the peril of the person injured is known, wilfulness or wantonness implies a direct intent to inflict injuries, or an act done or omitted with the consciousness that it would probably result in injury.

15. *Same; Contributory Negligence.*—Contributory negligence of the person injured is no defense where the proximate cause of the injury to one known to have been in peril is due to a wilful or wanton wrong.

16. *Same.*—Where the proximate cause of an injury to one known to be in peril is an act of simple negligence, contributory negligence of the person injured concurrent with or subsequent to that of the person charged with negligence after discovery of the peril, defeats recovery.

17. *Damages; Injuries; Complaint.*—Where the complaint definitely enumerates the elements of damage alleged to have been suffered by the plaintiff and his property, it is sufficient without designating the amount claimed for each element of damage.

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18. *Trial; Instructions; Request.*—Where counsel present several charges written on one sheet of paper, the court may treat it as a single request and refuse all the charges if one be bad. The better practice is to present each special charge to the court on separate pieces of paper.

(Denson and Mayfield, JJ., dissent in part.)

APPEAL from Calhoun Circuit Court.

Heard before Hon. JOHN PELHAM.

Action by Harry Rosen against the Anniston Electric & Gas Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Plaintiff's complaint was substantially as follows:

(1) The plaintiff claims of the defendant, a corporation, the sum of \$1,500 damages, for that, towit, on the 14th day of May, 1906, while the plaintiff was attending to some private business, riding in a buggy drawn by a horse along Pine avenue, which is a public street in the city of Anniston, Ala., and just as he was turning out of Pine avenue into and for the purpose of going westward along Fifteenth street, which is another public street in said city, one of the electric cars of the defendant, in charge of and being operated by an agent or servant of defendant, ran violently against plaintiff's horse and buggy, said buggy was demolished, and said horse thrown violently to the ground and his leg broken, and the plaintiff was thrown from the buggy to the ground. The plaintiff avers that the place of said collision was a street crossing, and a populous district in said city, and that he was turning from Pine avenue into Fifteenth street for the purpose of going westward along Fifteenth street on business as aforesaid, and defendant's car was approaching from a westerly direction along Fifteenth street, and was then, towit, 70 yards distant from the point of collision and in plain view of plaintiff's horse and buggy, and said motorman then and there in charge of said car saw, or by the exercise of reasonable care

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could have seen, plaintiff's buggy and horse in a position of peril on the track of the defendant, and he was then sufficiently far from the same, had he used due care and the means at hand, to have stopped said car before the collision, and thereby have prevented the injury, but he did not do so; and the plaintiff avers, further, that just before or about the time the front wheel of his buggy had reached the north rail of the tracks, said car was, towit, 60 feet distant, and the plaintiff averred that even then said agent or servant of defendant in charge of said car saw, or by the exercise of reasonable care could have seen his peril, and by the use of means at hand could have stopped said car in time to have prevented said collision and injury, but he failed to do so, and in consequence plaintiff suffered injury in this: Here follows a catalogue of his injuries and special damages. It is alleged that the horse was so injured that he was rendered worthless, and that the buggy and harness were totally destroyed, and that they were the property of plaintiff.

(2) Plaintiff claims of the defendant, a corporation, the sum of \$1,500 damages, for that heretofore, towit, on the 14th day of May, 1906, the defendant was engaged in the operation of electric street cars in the city of Anniston, Ala. On said date the defendant's said agents and servants, in charge of and operating one of its cars, after discovering that the plaintiff and his horse and buggy were on defendants' track in a position of peril, and in danger of being injured, failed to exercise due care and diligence to avoid injuring plaintiff, when the exercise of such care and diligence would have avoided injuring him, whereby said car struck said horse and buggy, and he was injured thus: Here follows a catalogue of his injuries and special damages. And plaintiff avers that the defendant's agent or ser-

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vant, in charge of or operating said car, saw and knew of his peril; but, notwithstanding this, he wantonly and recklessly or intentionally ran said car against him, and that he did not use the means at hand to prevent said collision and injury, when the use of such means would have prevented same, with same allegation as to horse and buggy as made in count 1.

(3) Same as 1, except that it is alleged that, just about the time the front wheel of the buggy reached the north rail of the track, plaintiff's horse balked or stopped, while plaintiff was trying to pull him off the track, and that said car was about 60 feet distant, and that even then the agent or servant of defendant, in charge of said car, saw, or by the exercise of due care and diligence could have seen, his peril, etc.

(4) Formal charging part same as 1. It is then alleged that the intersection of Pine avenue and Fifteenth street, where plaintiff turned out of Pine avenue into Fifteenth street, is a public street crossing, where a great many people, horses, and vehicles are accustomed to pass and repass, and was such on said date; and plaintiff avers that it was the duty of said agent or servant, in charge of and operating said car, to have run and to have kept said car under such control as to have been able to bring the same to a full stop before striking a person or thing on the track; but plaintiff avers that on such occasion the agent or servant of defendant, in charge of and operating car, ran the same at such a reckless and rapid rate of speed that he was unable to bring the same to a full stop before striking the plaintiff's horse and buggy, after he had discovered the said horse and buggy were on the track in a place of peril at or near the intersection of Pine avenue and Fifteenth street, whereby said car struck plaintiff's horse and buggy, and he was injured thus: Here follows a catalogue of the injuries to the person, horse, and buggy.

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The grounds of demurrers are sufficiently stated in the opinion. The second, third, fourth, fifth, sixth, and seventh pleas were pleas of contributory negligence. The fifth, sixth and seventh are failure to stop, look, and listen; the fourth, that plaintiff negligently drove his horse and buggy on said car track, and turned it up said car track towards the car and that it was negligence on the part of plaintiff not to have driven across said track and it was negligence to have driven on said track ahead of said car. The third avers the efforts to stop the car and the failure to do so after using all means, and that before driving over defendant's railway plaintiff failed to look for defendant's approaching car, and drove his said horse on the track ahead of said car. The second plea alleges that the street was wide enough where the collision occurred for plaintiff to have driven on either side of said track without injury, that the car was in plain view of plaintiff, that plaintiff could have stopped his horse and buggy until the car passed on, or that he could have turned the said horse and buggy up or down said street, with ample room to have avoided the collision, but that he did neither of these things, but negligently drove or allowed his horse to start across said track in front of defendant's car, and turned said horse and buggy towards said approaching car, which negligence proximately contributed to his injury.

BLACKWELL & AGEE, for appellant. It is necessary that the complaint specify the amounts sought to be recovered.—13 Cyc. pp. 176 and 179, and notes. The trial court took the view that the 1st, 2nd and 3rd counts of the complaint counted on willful, wanton or intentional negligence, but these counts do not make a case of that character.—*Anniston E. & G. Co. v. Elwell*, 144 Ala. 321; *Bir. R. & E. Co. v. City Stables*, 119 Ala. 650;

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Bir. R. & E. Co. v. Baker, 132 Ala. 518. The court erred in sustaining the demurrers to the pleas of contributory negligence.—*Bir. R. & E. Co. v. Pinkard*, 124 Ala. 375; *Schneider v. Mobile L. & Ry. Co.*, 146 Ala. 344. The duty on the motorman to stop the car on seeing a person in peril and the duty of the person crossing the track is the same, and a failure of the person driving the vehicle across a street car track to look for the approach of cars is contributory negligence.—*B. R. L. & P. Co. v. Oldham*, 141 Ala. 195; *Highland A. & B. R. Co. v. Maddox*, 100 Ala. 620; 27 A. & E. Ency of Law, 81. The motorman on an electric car has the right to presume that a person driving a vehicle will not attempt to cross the track so as to incur injury to him or his vehicle.—*Schneider v. Mobile L. & Ry. Co. supra*; *B. R. L. & P. Co. v. Clark*, 41 South. 829. The court erred in its oral charge.—*Pullman Palace Car Co. v. Adams*, 120 Ala. 581, and authorities there cited; *May v. Williams*, 27 Ala. 270. Counsel discuss charges given and refused but without citation of authority.

TATE & WALKER, for appellee. It was not necessary to aver the name of defendant's agent or servant operating the car.—*Armstrong v. Montgomery St. Ry. Co.*, 123 Ala. 245; 119 Ala. 615. Counts 1, 2 and 3 as amended sufficiently charged negligence.—*K. C. M. & B. R. R. Co. v. Flippo*, 138 Ala. 487; *G. P. R. R. Co. v. Davis*, 92 Ala. 307. The plaintiff was not a trespasser.—*Anniston E. & G. Co. v. Elwell*, 144 Ala. 317; *B. R. & E. Co. v. City Stable Co.*, 119 Ala. 650; *Bir. R. & E. Co. v. Baer*, 126 Ala. 135. Count 2 as amended was not subject to demurrers interposed.—*Levin v. M. C. R. R. Co.*, 109 Ala. 334; *M. & C. R. R. Co. v. Martin*, 117 Ala. 367; *L. & N. v. Orr*, 117 Ala. 367. The pleas interposed constituted no defense to counts 1, 2 and 3.—*B. R. & E. Co.*

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v. Brantley, 141 Ala. 614, and authorities cited. Counsel discuss charges given and refused, but without citation of authority.

McCLELLAN, J.—The injury complained of was suffered by the plaintiff, in person and property, in consequence of the collision therewith of a street car then in operation on a public thoroughfare in the city of Anniston. The original complaint contained two counts, to which defendant's (appellant's) demurrers were sustained. After amendment, the complaint consisted of counts 1 to 4, inclusive. All, save the fourth, would found the liability of the defendant upon the breach of duty by the servant of the defendant, arising out of plaintiff's imperiled condition. The principle is familiar, and the sixteenth ground of the demurrer, addressed to these counts, takes the point that it is not averred that the servant in question knew of plaintiff's peril in time to have prevented the injury.

The relative rights of travelers in public streets and street cars operated therein have been defined as being equal, not exclusive, in favor of or against either.—*Schneider v. Mobile L. & R. R.*, 146 Ala. 344, 40 South. 761. The exercise of the common right, by each, must be such as not to unreasonably hinder or endanger either in the use of the street; and upon the operative of the street car rests, as of course, the duty to be diligent in keeping a lookout for persons using the street and to bring to the operation of the car, under such circumstances, such measure of care and prudence as the common right enjoyed by the traveler and the street car suggest. This necessarily imposes upon the carrier the duty to operate its cars, in public streets, under such speed, as that, if persons or property be upon or dangerously near the track of the street railway, the car

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may be, with skilled application of stopping appliances, stopped, and injury thereto averted. But this duty is qualified to the extent that the operative of the car may assume that apparently adult persons, or property, such as horses and vehicles in the control of persons apparently adult, will leave, in time to avert injury, the track or dangerous proximity to it; but the stated qualification is also qualified by the requirement that the operative is forbidden to rely upon the stated assumption beyond the point where prudence and care would suggest the stopping of the car, such prudence and care being suggested, to a reasonably prudent man, by the reasonable appearance of inability upon the part of the party imperiled to remove himself or property from danger, or from such circumstances as would indicate, to the reasonably prudent operative, that the party imperiled, or likely to become so, is unconscious thereof.—*Schneider v. Mobile L. & R. R.*, *supra*. On the traveler upon the street the duty rests to “always * * * look for an approaching car, and, if the street is obstructed, to listen, and in some instances to stop. * * *” *Birmingham R. L. & P. Co. v. Oldham*, 141 Ala. 195, 199, 37 South. 452.

As stated before, all of the counts except the fourth would ascribe the negligent misconduct, resulting in the injury here involved, to a breach of duty after discovery of peril. The statement of the doctrine declaring the duty relied upon, in breach, for a recovery by this plaintiff, announces in terms the condition to the creation of the duty, viz., knowledge of the peril with which the party injured is circumstanced before his injury. This knowledge has been otherwise referred to in the descriptive term “aware,” meaning “informed.” The requisite knowledge is of the fact that the party injured was in peril. Manifestly this condition (knowl-

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edge) to the duty (pretermitted wanton or willful misconduct, to be later considered) cannot arise out of a breach of duty to look out for persons, etc., in peril, whatever the place of injury. If the duty be to keep a dilligent lookout, and the duty be merely negligently breached, the consequence is the opposite of knowledge, namely, want of knowledge, and that, on this phase of the subject, attributable only to the failure to observe that course of conduct which would have probably led to knowledge.—*Sou. Ry. v. Bush*, 122 Ala. 470, 26 South. 168. If a motorman, whose duty it is to keep a dilligent lookout for travelers, etc., on public streets traversed by his car, forsake his duty and engage in a diverting conversation with a passenger on his car, and a traveler, whose peril and inability to extricate himself therefrom would have been discovered by the operative, had he kept the lookout required, is injured, the proximate cause, aside from wanton or willful misconduct therefor must be ascribed, not to the stated condition of peril in which the traveler was placed, but to the operative's dereliction in not keeping the lookout prescribed. He did not know the peril stated, because he violated his duty to look. Such a breach of a duty, unless raised by the circumstances to the character of wrong commonly called "willfulness" or "wantonness," may be defended and defeated as ground for a recovery by the contributory negligence of the traveler, if attending his conduct, in failing to observe the care due from him (traveler) in placing himself in a position wherein injury to him might result from a breach by the operative of the duty to keep a dilligent lookout. This must be true, because the order of causation, put in motion by the negligence counted on, viz., failure to keep a dilligent lookout, was not broken by the creation, by discovery of the peril by the operative, of a subsequent duty to employ all means

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to avert injury to one whose peril is known to the derelict operative.—*L. & N. R. R. Co. v. Young*, 153 Ala. 232, 45 South. 238, 16 L. R. A. (N. S.) 301. When the subsequent duty is raised, as stated, then the initial negligence of the injured party becomes a condition only, upon which the thereupon arising duty to avert the injury operated to afford the proximate cause of the injury, unless the imperiled party is, on his part, concurrently with or subsequently to the negligence of the operative of the car, after discovering the perilous situation of the injured party, contributorily negligent, which, if found, exempts the defendant from the consequences of the subsequent negligence of its employe.—*L. & N. R. R. Co. v. Young, supra*.

The relative rights of travelers and street cars, in public streets, as we have restated them, necessarily negative any relation of either to the streets or to the other as trespassers. The right to be thereon exists in each, and the duty each owes to the other, in the premises, is, in keeping with the common right of each, to avoid, by the exercise of due care and prudence, injury and embarrassment in the use of the street. But the fact that a traveler is not a trespasser in using the street cannot affect to alter the duty, for or against either the car operative or the traveler, where one's condition of peril is known to the operative. Whether one is or is not a trespasser, the condition to the application of the principle of the negligent breach of duty after peril is discovered is the same. The duty to avert injury to one imperiled is the same, whether his relation to the dangerous agency theretofore was wrongful or not, whether his situation of peril was the result of right or wrong conduct; provided, of course, the operative knew of the peril to which the injured party was subjected. Whenever the knowledge stated is brought to the opera-

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tive, his duty is to employ all means, known to one skilled in his place, to avert injury.

Coming to the more aggravated misconduct—willfulness or wantonness, as these terms are applied in cases of injury to person or property—with reference to the performance of the duty arising where the beforestated peril is known to the operative, our decisions establish these conditions precedent to the ascription of the more aggravated wrong to the alleged derelict party: That the injury was the result of a direct intention to inflict it, or that the injury was the result of an act or omission to act as duty required; the action or failure to act being then taken or omitted with the consciousness that such act or omission would probably eventuate in injury. The standard for determination of the inquiry whether the act or omission to act was wanton or intentional must necessarily be the same, regardless of the reason for the creation of the duty in the premises. Given the duty to avert injury, the character of the act or omission to act coloring it as merely negligent, or as wanton or willful in negation of mere negligence, depends upon the presence, at the time the duty should have been performed, of the conditions we have restated for wantonness or willfulness vel non. In natural consequence, the proximate cause of an injury to one known to have been in peril may be the product of simple negligence or of willful or wanton wrong. If characterized by the elements essential to make a case of willful or wanton wrong, then contributory negligence of the imperiled party, such as negligent failure to conserve his own safety after he has become aware of his peril, is, as in cases generally, no defense. But if the duty to avert injury to one known to be in peril is unobserved, from inadvertence or mistake, and without the conscious indifference to probable consequences stated before, then

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contributory negligence of the injured party—concurrent with or subsequent to that of the party charged, after discovery of peril—such as the negligent failure to conserve his own safety after he has become aware of his peril, is a defense, and will defeat a recovery for such breach of duty predicated upon discovery of the injured party's peril. In *L. & N. R. R. Co. v. Young*, *supra*, we noted many of our decisions declarative of the principles stated in respect of initial, subsequent, and contributory negligence, and hence do not recite them.

Applying these principles to the complaint as amended, the sixteenth ground of demurrer should have been sustained to counts 1 and 3. Both of these counts allege that plaintiff's position of peril was known to the motorman, "or by the exercise of reasonable care" could have been known to him. The alternative averment is, of course, not the equivalent of an averment of the requisite knowledge. The pleader had for this alternative averment high authority in *B. R. L. & P. Co. v. Brantley*, 141 Ala. 614, 37 South. 698. In that cause this court approved charge 3, requested for the plaintiff therein, which charge declared, in effect, among other things, that, since the duty to keep a diligent lookout was on the motorman, the "law charges the motorman with seeing the exposed condition of the wagon or of the plaintiff. * * *" Evidently these counts were drawn in the light of the *Brantley Case*. We feel compelled, upon principle and authority, to condemn the proposition quoted from the approved charge. If the proposition be sound, then actual knowledge is not an essential condition to the creation of the duty to avert injury after discovery of peril. On the contrary, the condition is suppliable as a matter of presumptions arising from the mere existence of the duty to keep a lookout. This court, in *Osborne v. Ala. S. & W. Co.*,

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135 Ala. 571, 577, 33 South. 687, ruled that, in pleading, notice is not the equivalent of knowledge, thus in consequence, we think, refuting the proposition, less strong than that treated in the *Osborne Case*, that from the mere existence of a duty the law will, in such cases as this presume such actual knowledge of peril as the performance of the duty would have afforded. To attain such a result as the *Brantley Case*, approves, it must be presumed that the motorman performed his duty to keep a diligent lookout, and still further, and additionally, to presume that such lookout would have resulted and did result in his actual knowledge of the peril. Of course, to conclude actual knowledge from such bases is assumption not supported by fact.

Count 2 avers that the motorman knew of plaintiff's peril and that of his property, and "failed to exercise due care and diligence to avoid injuring plaintiff, when the exercise of such care and diligence would have avoided injuring him." After describing injuries received, both to person and property, it is further averred in this count that "defendant's agent or servant in charge of and operating said car saw and knew of his peril, but notwithstanding this he wantonly and recklessly or intentionally ran said car against him, and that they did not use the means at hand to prevent said collision and injury when the use of said means would have prevented same." It is evident from a reading of the count that it is inconsistent and repugnant, as objected in the twenty-seventh ground of demurrer. In one phase it avers a negligent failure to take means to avert injury after discovery of peril, and latterly therein ascribes the injury to wanton and reckless or intentional driving of the car against plaintiff, and still later therein avers simply that means at hand were not used to avert injury, as could have been done by such use. The lines between

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wanton and willful wrong and such wrong as results from simple negligence, of course, compel, in pleading, the observance of the distinctions between the two. The primary pleading should leave no doubt of the character of the wrong imputed—whether wanton or willful, or merely negligent. Duplicity in this respect is not tolerable.—*L. & N. R. R. Co. v. Markee*, 103 Ala. 160, 15 South. 511, 49 Am. St. Rep. 21. The question whether a given count is in simple negligence, or for wantonness or willfulness, oftenest arises on the propriety of the plea of contributory negligence, permissible as a defense to the former, but not to the latter. So many of our cases have taken the course consequent upon a determination of the question stated, and accordingly allowed that species of plea. But, where the count assumes to charge both, and the demurrer takes the point, the court cannot aid the inaccuracy of pleading by choosing when the pleader has not chosen.

Count 4, after setting forth the rightfulness of plaintiff's presence in and use of the public street, and which was a place—street crossing—where a great many people and turnouts were accustomed to pass and repass, and were so doing where the injury occurred, avers, in substance, that it was the duty of defendant's servant or agent to so operate the car as that it might be under such control as that it might be brought to a full stop before striking a person or thing on the track; that this car was so negligently operated, in that it was run under such rapid and reckless rate of speed that the operative was unable to bring the car to a full stop before striking plaintiff and his property, after the operative had discovered the peril of plaintiff and his property on the track. This count cannot be held to charge willful or wanton injury, for the reason that it is not averred therein that the operative of the car knew of the con-

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ditions of accustomed frequent use of the street crossing in question, so as to impute to him knowledge of the probability of the presence there on that occasion, on the track or in dangerous proximity to it, of persons or property liable to injury by his car.—*M. & C. R. R. Co. v. Martin*, 117 Ala. 367, 385, 23 South. 231, and its many successors in ruling on this point. The count, then, is in simple negligence; and we must determine whether the negligence imputed is initial or subsequent, as related to the presence of plaintiff on or dangerously near the track—whether, to be more concrete, the negligence ascribed was a breach of duty predicated upon the peril alleged to have been discovered, or, on the other hand, was anterior in order of committal to such discovery of peril. If the averments refer to initial negligence, as indicated, then, of course, negligence of the plaintiff, if present on the occasion in putting himself or his property in a position of peril, would be a pleadable defense. If, on the other hand, the negligence averred refers to a duty breached after discovery of peril, then such negligence of the plaintiff, if present, would not be pleadable for the reasons we have before stated.

The court below, in overruling the demurrer to the several pleas of contributory negligence to the fourth count, evidently construed the count as charging negligence anterior to a breach of duty raised by discovery of peril. We affirm the correctness of this construction of the count. Since a willful or wanton wrong is not therein imputed, to construe the count as charging subsequent negligence after peril discovery would be to ignore the unequivocal averment of duty, and its breach, in respect of the operation of the car prior to and independent of the discovery of plaintiff's peril. The idea sought to be stated in the count is, in short, that the operative was so negligent in the operation of the car,

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at or about the street crossing mentioned, that when he discovered plaintiff's peril he was powerless to avert the impact by the use of all means at hand to stop the car. So interpreted, the count was not subject to the demurrer assailing it, though we are not prepared to affirm, and do not consider the question, that the broad statement of the duty set forth in the count is sound—a matter not tested or raised by any ground of the demurrer interposed. Our recent cases of *B. R. L. & P. Co. v. Brown*, 152 Ala. 115, 44 South. 572, and *B. R. L. & P. Co. v. Jones*, 153 Ala. 157, 45 South. 177, are noted as bearing on these questions. The first of these decisions involved an injury not occurring on a track in a public highway; and the second dealt with an injury to an infant, not chargeable with contributory negligence, and hence the holding therein, in one phase of the case, that the negligent failure of the operative to keep a diligent lookout, if proximately causing the injury, rendered the defendant liable, regardless of whether the peril of the child had been discovered or not. These cases are, therefore, not in point in the determination of this appeal.

Turning to the pleas of contributory negligence, and applying the principles announced before, none of these pleas set up matter in defense of the subsequent negligence charged in counts 1 and 3. The eighth ground of plaintiff's demurrer took the objection indicated. However, such pleas were, as the court below ruled, answers to the fourth count of the complaint. These pleas, as matter of defense to the fourth count, were not, we think, subject to any of the objections to substance, suggested by the demurrer.

The court erred in overruling defendant's demurrer to counts 1, 2, and 3, for the reasons stated, though we should add that those grounds of defendant's demurrer assailing the counts for failure to aver the name of the

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alleged derelict servant and to designate the amount claimed for each element of damage were not well taken. Our system of averring, in such cases as this, negligence in general terms, has become fixed beyond hope of change, even if it were thought desirable. The elements of damage alleged to have been suffered by plaintiff and his property were definitely enumerated in the complaint; and we know of no ruling by this court, nor good reason, justifying a departure from the universal practice, in this state, of stating in the complaint, without apportioning, the total damage claimed for the injuries averred.

None of the assignments rest on the giving or refusal of special instructions for either litigant. There are assignments complaining of portions of the court's oral charge. Specific treatment of these assignments is unnecessary, in view of the conclusions stated before.

The last assignment is as follows: "In refusing the request of defendants counsel to' write 'Given' or 'Refused' on each of the several charges from 1 to 8, inclusive, and sign his name thereto separately." From the bill it appears these special charges were written on one sheet of paper. The court made one indorsement of "Refused" on this sheet; but counsel for defendant requested the court to enter the indorsement, stated in the quoted assignment, on or opposite each of said charges 1 to 8, inclusive. The court declined to do so, treating the request as single of all of said charges. This action was proper. Counsel not having separated these charges, the court was under no duty to do so. Special charges should, if intended, by counsel requesting them, to be separate requests, and not in bulk, always be presented to the court on separate sheets or pieces of paper.

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The errors indicated require the reversal of the judgment and the remandment of the cause.

Reversed and remanded.

TYSON, C. J., and DOWDELL, SIMPSON. and ANDERSON, J.J., concur.

DENSON, J.—I concur in the reversal of the judgment; but in respect to count 2 I am of the opinion that the injury complained of is ascribed solely to negligence on the part of the motorman; that the count cannot be construed as ascribing the injury to wantonness, recklessness, or intentional misconduct; and that these averments might well be stricken from the count as surplusage.

MAYFIELD, J., concurs in the reversal, but is of the opinion that the Brantley Case is not susceptible of the construction given it in the opinion. He is of the opinion that there is no conflict between the Brantley Case and the opinion in this case.

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Action for Failure to Deliver Goods.

(Decided Feb. 11, 1909. 48 South, 814.)

1. *Carriers; Failure to Deliver Goods; Contract of Shipment.*—Where goods were shipped under a contract providing that no liability for damages or loss should attach to the company unless claim for such damage was promptly made after arrival, and if delayed more than thirty days, after delivery of the property, or after a due time for delivery, a plea which fails to allege that no claim was made within thirty days after due time for delivery is bad, the contract being relied on as a defense and the action being for a failure to deliver; nor can the court say, as a matter of law, in the absence of any agreement that from Feb. 27, to May 16, a due time for delivery had elapsed; neither can the court say, as a matter of law, that because part of the freight had been delivered on Feb. 27, a reasonable time had elapsed for the case not delivered.

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2. *Evidence; Documentary Evidence; Receipt.*—A receipt signed by mark by an agent of the consignee of goods, although not attested or acknowledged, is valid, and its effect cannot be limited on its admission in evidence in an action against the carrier for a failure to deliver the goods received for.

3. *Carriers; Failure to Deliver; Freight Charges.*—Evidence of what freight charges the consignee had paid on the case delivered is admissible in an action against a carrier for failure to deliver a case of goods included in the shipment, but which was afterwards delayed.

4. *Charge of Court; Undue Prominence.*—Charges which accentuate certain parts or phases of the evidence, are properly refused.

5. *Appeal and Error; Erroneous Charges; Reversal.*—A cause will be reversed and remanded where a charge is given erroneously limiting the effect of evidence, where this court cannot know from the record the effect of such charge.

APPEAL from Marengo Circuit Court.

Heard before Hon. W. W. QUARLES, Special Judge.

Action by R. W. Price, agent, against the Louisville & Nashville Railroad Company, for failure to deliver goods. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

The proof showed that the Louisville & Nashville Railroad Company received the first shipment under the bill of lading and delivered it on the 27th day of February, 1903, and that one case of cotton fabric was marked short; that on the 13th day of March, 1903, this particular case of fabric was delivered, and that he notified Mr. Price that the goods had arrived; that on the 31st day of March, 1903, Enoch Hester brought an order to the agent from Mr. Price to deliver any freight that he had; and that this particular case was delivered to Enoch Hester, a colored drayman, and his receipt taken for it. Witness identified the receipt shown, and testified that he wrote Enoch Hester's name to it and Enoch made his mark. The following is the receipt as set out in the record:

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Form 701 Freight Receipt Slip No. 316

2

Reversed October 8, 1902

M. R. W. Price, R. 1767/Station, 3-28, 1903.

Received of the Louisville and Nashville Railroad
Company.....
In good order the following described property:.....
Articles Weight Rate Freight and Charges-----
1c Feb. 330 24 3.10

Way Bill 1308

Car -----

3/27 1903

From Selma

Consignor,

Original point of shipment

Original Car

All bills payable in bankable funds. 3/31 1903

his

Enoch X Hester.

mark

Objection was interposed to the receipt because, first the name of Enoch Hester is signed thereto by mark, and that there are no attesting witnesses, and because the same is not a valid signed receipt. The court in its oral charge said: "I charge you that the receipt introduced in evidence is limited to a memorandum for the purpose of refreshing the recollection of the witness, and that the same is not a valid receipt." The following charges were requested by the defendant: "The

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court charges the jury that, if they believe the evidence in this case, they must find in favor of the defendant." The other two charges were the general affirmative charges as to the first and second counts.

A. M. PITTS and A. D. PITTS, for appellant. The court erred in sustaining demurrers to pleas three and four.—*Harris v. W. T. U. Co.*, 25 So. Rep. 910; *Armstrong v. Chicago M. & St. Co.*, 54 N. W. 1059; *Western Railway Co. v. Harwell*, 91 Ala. 342; *So. Ex. Co. Caldwell*, 21 Wall 264; *So. Exp. Co. v. Nunnicut*, 54 Miss. 566; 85 Fed. Rep. 985; 10 N. Y. S. R. 803. The court erred in overruling objection to the question in regard to freight charges.—72 Ala. 451; 89 Ala. 534; 90 Ala. 366. The court erred in sustaining the objection to the introduction of the receipt in evidence.—*Bates v. Harce*, 26 So. Rep. 898; *Bickley v. Keenan & Co.*, 60 Ala. 293. The court erred in refusing charges requested by the defendant.—5 Amer. & Eng. Enc. 198; 46 Ala. 63.

C. K. ABRAHAM, for appellee. The court properly sustained demurrers to the defendant's pleas.—*Southern Express Co. v. Caperton*, 44 Ala. 101; *Southern Express Co. v. Bank of Tupelo*, 108 Ala. 517; *Broadwood v. Southern Express Co.*, 41 South. 769; *Southern Express Co. v. Owens*, 41 South. 752. There is no question of the liability as warehouses in this case. The liability is that of a common carrier.—*Tallassee Falls v. Western Ry.*, 128 Ala. 167; *A. & T. R. R. Co. v. Kidd*, 35 Ala. 209; *M. & G. R. R. Co. v. Pruett*, 46 Ala. 63; *L. & N. v. Oden*, 80 Ala. 38. The receipt was not shown to have been properly executed.—Secs. 1 and 1805, Code 1896; *Ballow v. Collins*, 139 Ala. 543. As to proof of value see.—97 Ala. 341; 90 Ala. 36; 99 Ala. 325; 89 Ala. 287; 52 Ala. 606. As to the question of freight paid,

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see.—*Johnson v. Beard*, 93 Ala. 96; *S. & N. Ala. R. R. Co. v. Wood*, 72 Ala. 451. The court did not err in limiting the effect of the freight receipt.—75 Ala. 432; 70 Ala. 303; 36 Ala. 703. The value of the lost goods were properly proven by Price.—*Echols v. The State*, 41 South. 298; *Burks v. Hubbard*, 69 Ala. 379; *E. T. V. & G. R. R. Co. v. Watson*, 90 Ala. 41.

MAYFIELD, J.—This is an action by appellee against appellant as a common carrier for failure to deliver one case of cotton fabrics. The defendant pleaded the general issue and two special pleas, Nos. 3 and 4. Special plea No. 3 attempted to avoid liability by setting up the provision of the contract of shipment reading as follows: "That claims for loss or damage must be made in writing to the agent at the point of delivery promptly after the arrival of the property, and if delayed for more than 30 days after the delivery of the property, or after a due time for the delivery thereof, no carrier hereunder shall be liable in any event." Plea No. 3 averred that on February 27, 1903, other goods shipped under this contract were delivered to the plaintiff, and that he did not file his claim for the goods, the subject of this suit, until May 16, 1903. The special contract set up in plea No. 4 was as follows: That the plaintiff was to file in writing his claim for damage or injury or for loss of said goods within 30 days after the receipt of the goods, or after the time of the receipt of the goods with the agent of the defendant at the place of the delivery of the goods. The plaintiff demurred to these pleas.

These pleas are evidently insufficient, for the reason that the action was for a failure to deliver at the destination, and not for damages or destruction of the property. Consequently the plea should have alleged that there was a failure to make demand for more than 30

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days after "due time for delivery." The plea should have alleged that no demand in writing was made for more than 30 days after due time for the delivery, because the 30-day period, in accordance with the special contract set up in that plea, did not begin to run until there was a delivery of the property at its destination, and that there was no delivery until after the lapse of due time for delivery. In the absence of a contract or an agreement, neither the trial court nor this court could say that there had been a lapse of due time for delivery. Of course, it could not be predicated upon the first clause of the special contract relied upon, because the 30 days in that case begins to run from the time of delivery; and there was no delivery—that is, the plea does not allege any delivery, nor does it show that more than 30 days had elapsed after a reasonable time for delivery. The court could not say, as matter of law, that because a part of the freight had been delivered on February 27th a reasonable time had elapsed for the delivery of that part the subject of this suit. As a matter of fact, it appears from the evidence and from the plea, taken together, that there was a reasonable time; but, in order for the plea to be sufficient, it must specifically aver—that is to say, seeking to avoid liability because of a special contract, it must clearly bring the defendant within the provisions of the contract. This it fails to do.

Plea No. 4 was defective for the same reason. The contention in the lower court, as to these pleas, seems to have been whether or not the special contract relied upon was valid. It is not necessary for us to decide that question, because the pleas were each insufficient for the reason pointed out, if the special contract be valid. The decisions of our own court, as well as those of many other states, are at variance as to whether or not such

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contracts are valid. Our court, in the case of *Southern Express Co. v. Caperton*, 44 Ala. 101, 4 Am. Rep. 118, in effect held that such a special contract between a shipper and a common carrier was void. This case has been followed and cited approvingly by our court several times since its rendition. It was, however, criticised by the Supreme Court of the United States in the case of *Express Co. v. Caldwell*, 2 Wall. 264, 22 L. Ed. 556, wherein the Supreme Court, through Strong, J., referring to *Caperton's Case*, used this language: "This case is a very unsatisfactory one. It seems to have regarded the stipulation as a statute of limitations, which it clearly was not, and it leaves us in doubt whether the decision was not rested on the ground that there was no sufficient evidence of the contract." McCLELLAN, C. J., speaking of a similar provision in a contract limiting liability of telegraph companies, in the case of *Harris v. Western Union Telegraph Co.*, 121 Ala. 519, 25 South. 910, 77 Am. St. Rep. 70, which required the making of a claim in writing and presenting it within 60 days after the message was filed with the company for transmission, says: "The rule here set out is a reasonable one. It does not limit the defendant's liability for negligence, but only requires a reasonable notice to the defendant of claims for damages." Coleman, J., in the case of *Southern Express Co. v. Bank of Tupelo*, 108 Ala. 517, 18 South 664, speaking of the provision of the contract which required presentation of the claim in writing to the defendant within 32 days from the date of the contract, used the following language: "In the case of *Southern Express Co. v. Caperton*, 44 Ala. 101, 4 Am. Rep. 118, a similar provision in a receipt given for money as in the present case was held to be unreasonable and that it tended to fraud and was inoperative." No reason was given in the argument of counsel why the rule

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is not sound, and consequently the special contract in that case under consideration by Justice Coleman was declared to be void. Haralson, J., in the case of *Broadwood v. Southern Express Co.*, (148 Ala. 17, 41 South. 769), speaking of a similar stipulation or provision in contract of shipment of common carriers limiting liability to 90 days used the following language: "The reasonableness vel non of the stipulation of the kind under consideration is one of law for the determination of the court. Whatever may be the decision of the courts of other states and of the Supreme Court of the United States, this court is committed to the proposition that a contract fixing 30 days as the time within which such claims must be presented is not reasonable."—Citing *Caperton's Case*, 44 Ala. 101, 4 Rep. 118; *Southern Express Co. v. Bank of Tupelo*, 108 Ala. 517, 18 South. 664; *Southern Express Co. v. Owens*, 146 Ala. 512, 41 South. 752, 8 L. R. A. (N. S.) 369, 119 Am. St. Rep. 41. "But these cases," says Justice Haralson, "are not conclusive of the question as to whether 90 days should be considered reasonable." But, referring to the case of *Harris v. Western Union Tel. Co.*, 121 Ala. 519, 25 South. 910, 77 Am. St. Rep. 70, holding that 60 days was reasonable he thereupon held that presentation within 90 days was a reasonable stipulation and that it was valid.

There was no error in the court's overruling the objection of the defendant to the question, propounded to the plaintiff, as to what freight charges he paid on the goods. This, if not a proper element of damages, was admissible and relevant for other purposes. But the court was clearly in error as to the limitation placed upon the receipt offered in evidence—the restriction of its use for any purpose, except as a mere memorandum to refresh the memory of the witness—as well as in the

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charge to the jury to the effect that the receipt offered was not a valid receipt. It was not necessary that the signature to this receipt should have been attested. It was clearly not within the provision of the Code, and if the party who signed it had the authority to receive the goods and to receipt for the same, and did sign it by mark and deliver it to the agent of the defendant company, it was as valid as a receipt as if it had been attested or acknowledged.

There was no error in the court's refusing to give either of the charges requested by the defendant. Such charges would be gratuitous accentuations of certain parts or phases of the evidence; and, while they are not strictly general affirmative charges for the defendant, they are in the nature thereof. This being true, the charges here in question being based upon a part of the evidence only were well refused.

We cannot know what effect, if any, the charge of the court upon the nature of the receipt offered by the defendant as evidence had upon the jury; and for the error of limiting the effect of the same as evidence the case must be reversed.

Reversed and remanded.

DOWDELL, C. J., and ANDERSON and McCLELLAN, JJ.,
concur.

[Central of Georgia Railway Co. v. Sturgis.]

**Central of Georgia Railway Co.
v. Sturgis.**

Damages for Depredation of Stock Through Stock-Gap.

(Decided Feb. 11, 1909. 48 South. 810.)

1. *Limitation of Actions; Pleading; Amendment.*—Where the original complaint alleges the failure of the company to keep the stock gaps in repair on account of which stock entered upon the lands and destroyed the crop, an amended complaint alleging a negligent failure to keep the cattle guards in repair thereby allowing hogs to pass over the stock gap into the lands of plaintiff, is within the *lis pendens*, and relates back to the original complaint, and is not subject to the statute of limitations.

2. *Appeal and Error; Questions Reviewable; Immaterial Matter.*—Where the original complaint was brought within a year of the injury and the amendment was within the *lis pendens*, it was immaterial whether the action was barred by the statute of one or six years.

APPEAL from Covington Circuit Court.

Heard before Hon. H. A. PEARCE.

Action by R. M. Sturgis against the Central of Georgia Railway Company for damages to land from the trespass of stock. From a judgment for plaintiff, defendant appeals. Affirmed.

The action was begun in the justice court, and summons was executed on the 6th day of January, 1904. In the justice court the complaint was as follows: Plaintiff claims of defendant the sum of \$100 for damages caused by hogs getting through the stock gaps of said Centray of Georgia Railway Company's railroad into the fields of said plaintiff from the 12th day of September, 1903."

The second count is as follows: "The plaintiff claims of the defendant the sum of \$100 as damages, as follows: Plaintiff avers that he operates a farm in Covington county, Ala.; that said farm was inclosed by a fence

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that he cultivated during the year 1903, on said farm, corn, cotton, potatoes, and ground peas. Plaintiff avers that defendant was engaged in operating a railroad in Covington county, Ala., and that the track of said defendant's railroad runs through plaintiff's farm; and plaintiff says that it is the duty of defendant to erect suitable stock gaps where defendant's railroad track enters into and passes out of plaintiff's farm, and to keep the same in such repair and condition at all times as will prevent stock from going over defendant's track and into plaintiff's farm. And plaintiff avers that defendant negligently allowed the stock gap where defendant's railroad track enters plaintiff's farm to remain out of repair, or in such condition that hogs could pass over the said stock gap and into plaintiff's farm. And plaintiff avers that, in consequence of said stock gap being allowed to remain in such condition, a great number of hogs went over the same and into plaintiff's farm, and said hogs broke down and destroyed a great deal of plaintiff's corn, and rooted up and destroyed a great many of his potatoes and ground peas, then growing thereon, namely, from the 19th day of September, 1903. All of which was caused by the negligence of defendant in allowing said stock gaps to remain out of repair, or in such condition that the stock could pass over it, to the great damage of plaintiff," etc.

The plaintiff by leave of the court amended his count by adding the following: Count 3: "Plaintiff claims of the defendant the further sum of \$100 as damages, for that he is the owner of a farm in Covington county, Ala., and was the owner of the same during the months of September, October, and November, 1903, and that defendant was during such time engaged in operating a railroad in and through said county, which railroad passed through the said lands of the plaintiff. Where

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said railroad entered upon or into the cultivated land of plaintiff, the defendant had construed a cattle guard; but, after demand made by plaintiff upon defendant's agent, H. B. Vardeman, the defendant negligently failed to keep the said cattle guard in good repair, whereby a great number of hogs were allowed to pass over around, or through said stock gap, and into the said cultivated land of plaintiff, during said time, to wit, September, October, and November, 1903, and broke down and destroyed a great deal of plaintiff's corn, and rooted up and destroyed a great many of his ground peas and potatoes, planted and then growing on said cultivated land, which were of value to plaintiff, to his damage as aforesaid.

Demurrers were confessed to the first and second counts, and the trial was had on the third count, which appears to have been filed June 13, 1905. The ground of demurrer B, interposed to the third count, was that said count is a departure from the original complaint, in this: That the negligence complained of in the original complaint was a failure to keep the stock gap in repair, and the negligence complained of in the amended count 3 is a failure to keep the cattle guard in repair. The pleas were: The general issue to the whole complaint, and the statute of limitations of one year to the amended count.

STEINER, CRUM & WEIL, and POWELL, ALBRITTON & ALBRITTON, for appellant. The court erred in refusing to give charges 1, 2, 3, and 4 requested by appellant, since the 3rd plea was proven.—*N. C. & St. L. Ry. v. Hill*, 146 Ala. 240; *Rasco, et al. v. Jefferson*, 38 South. 246.

C. E. REID, for appellee. The 3rd count added by way of amendment was within the *lis pendens*, and related

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back to the commencement of the suit.—*H. A. & B. R. R. Co. v. Sanford*, 112 Ala. 425; *Taylor v. Smith*, 104 Ala. 537; *N. C. & St. L. Ry. v. Hill*, 146 Ala. 240.

ANDERSON, J.—The third count, filed as an amendment, was within the *lis pendens*, and related back to the original complaint, so as to intercept the running of the statute of limitations as against the amended count.—*L. & N. R. R. v. Woods*, 105 Ala. 561, 17 South. 41; *Alabama Co. v. Heald*, 154 Ala. 580, 45 South. 686. The suit having been brought within a year after the alleged injury, the cause of action was not barred, and the pleas were not proven, even if this action was barred by the statute of one year, instead of six, which we need not decide.—*Rasco v. Jefferson*, 142 Ala. 705, 38 South. 246; *N. C. & St. L. R. R. v. Hill*, 146 Ala. 240, 40 South. 612.

The judgment of the circuit court is affirmed.

Affirmed.

DOWDELL, C. J., and McCLELLAN and MAYFIELD, JJ., concur.

Central of Georgia Railway Co. v. Dothan Mule Co.

Action for Damages for Injuries to Stock.

(Decided April 15, 1909. 49 South. 243.)

1. *Carriers; of Goods; Live Stock; Action for Damages; Instruction.*—Where the action was for damages for injury to live stock by the consignee against the delivering carrier, a charge asserting that where the carriage of freight is to be over several connecting carriers, as in this case, it seems that if the consignee bringing the suit shows to the jury that the animals were in good condition when delivered to the initial carrier, and that they were not in good condition when delivered to the discharging carrier, and the suit is against the discharging carrier, then these facts alone without more

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put the burden on the defendant, the discharging carrier, to show to the reasonable satisfaction of the jury that the harm and injury did not come to the animals while they were in the keep of the discharging carrier, is a clear and explicit statement of the law of this case and clearly not abstract.

2. *Same; Instructions; Effect of Testimony.*—A charge asserting that the mere fact that a certain witness testified that the animals for whose injury the suit was brought did not show damage when they were unloaded by the initial carrier, did not prove that they were in good condition when delivered to the defendant, was properly refused for the reason that the question as to what the witness' testimony proved was for the jury and not for the court.

3. *Appeal and Error; Harmless Error; Instructions.*—It is not error to reversal to give an abstract charge although inapplicable to the proof; and if the adversary party deemed it necessary that it be explained to make it applicable to the case, the duty was on such party to have requested explanatory charges.

4. *Charge of Court; Singling Out Testimony.*—A charge which singles out the testimony of one witness and asserts that it did not prove a certain fact not only singles out the testimony but requires of the court to pass upon the weight and sufficiency of evidence.

APPEAL from Montgomery City Court.

Heard before Hon. A. D. SAYRE.

Action by the Dothan Mule Co., against the Central of Ga. Ry. Co., for damages to live stock during transportation. From a judgment for plaintiff defendant appeals. Affirmed.

STEINER, CRUM & WEIL, and W. F. THETFORD, JR., for appellant. Counsel insist that the court erred in the oral charge given and in the refusal of written charge 8 requested by the defendant, and in support of their insistence, they cite and criticise the case of.—*M. & E. R. R. Co., v. Culver*, 75 Ala. 587, and *L. & N. v. Jones*, 100 Ala. 263, and seeks to differentiate them from the case at bar. On the question of notice of the injury they cite.—*Western Ry. Co. v. Hardwell*, 91 Ala. 340.

HILL, HILL & WHITING, for appellee. Counsel insist that the bill of exceptions was not signed in time and that it should be stricken.—Rule 30, p. 1200, Code 1896; *Abercrombie, et al. v. Vandiver*, 140 Ala. 228. It is well

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established that the concurring negligence of two parties makes both liable to a third party injured thereby, although the act alone of the party sued might not have caused the entire injuries.—1 Thomp. on Neg. sec. 76; 31 L. R. A. 570. The court properly denied motion for new trial.—*Cobb v. Malone*, 92 Ala. 330; *Taylor v. Caley*, 113 Ala. 580; *Alabama Co. v. Brown*, 129 Ala. 286. The condition in the contract as to when the claim should be filed is unreasonable and void.—*Southern Express Co. v. Bank of Tupelo*, 108 Ala. 517; *Crook's Case*, 44 Ala. 468. Appellant was not entitled to a new trial on the grounds of surprise or accident.—95 Ala. 287; 98 Ala. 168; 108 Ala. 81.

MAYFIELD, J.—This is an action by the shipper of live stock to recover damages from the delivering carrier for injury to the live stock delivered by the carrier to the shipper. Issue was joined upon the complaint after counts 7 and 8 were stricken, which resulted in a verdict for the plaintiff for \$748.80. from which judgment the defendant appeals. Defendant also made a motion for a new trial, which was denied by the court, and the action of the court in denying the motion it assigns as error on this appeal.

It is assigned as error that the trial court gave, as a part of its oral instructions, the following: "But where the carriage of freight is to be over several connecting carriers, as was the case here, it seems that if the consignee bringing the suit in this case, shows to the jury that the animals were in good condition when delivered to the initial carrier, and that they were not in good condition when delivered by the discharging carrier, and the suit is against the discharging carrier, then these facts alone, without any more, put the burden on the defendant, the discharging carrier, to show to the rea-

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sonable satisfaction of the jury that the harm and injury did not come to the animals while they were in the keep of the discharging carrier, and that is the law in this case, and it will be for you to make application of it to the evidence as you have heard it." It is also assigned as error that the trial court refused to give written charge No. 8, requested by defendant, as follows: "The court charges the jury that under the evidence the mere fact that witness F. M. Perry testified that the animals sued for did not show damage when they were unloaded from the car, after they were transported to Montgomery by the Louisville & Nashville Railroad Company, does not prove that the animals were in good condition when they were delivered to defendant." The third assignment of error is "that the court below erred in overruling motion of defendant for a new trial."

It is insisted by appellee that the bill of exceptions should be stricken in this case; but it is unnecessary for us to consider that question, for the reason that the case must be affirmed, though the bill be not stricken.

The part of the oral charge excepted to above, embraced in the first assignment of error, is a clear and explicit statement of a proposition of law therein as heretofore decided by this court, and we see no reason to decline to follow the former decision.—*L. & N. R. R. Co. v. Jones*, 100 Ala. 263, 14 South. 114; *M. & E. R. R. Co. v. Culver*, 75 Ala. 587, 51 Am. Rep. 483. If that part excepted to was not applicable to this case, and was therefore abstract, it would not be reversible error to give it to the jury; but it was by no means abstract, and it was clearly applicable. If it needed the explanation insisted upon by counsel for appellant to make it applicable to the case at bar, this should have been done by requested charges on the part of the appellant.

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Charge No. 8, requested by the appellant, was properly refused, for several reasons. Whether or not the testimony of the witness that the animals did not show damage when they were unloaded at Montgomery and delivered to the defendant company proved that they were in good condition when delivered was a question of fact for the jury, and not for the court. The court not only properly refused this charge for this reason, and for the further reason that it singled out the evidence of one witness and requested that the court charge that it did not prove a certain fact, but it would have been error for the court to give the charge, for the reason that the court would thereby pass upon the weight and sufficiency of the evidence. The able brief of the learned counsel, filed in this case, is a very strong and persuasive argument as to the weight and sufficiency of the evidence to make out a case against the defendant; but the weight and the sufficiency of the evidence are questions for the jury, and not for the court. It is not necessary for us to here discuss the weight or the sufficiency of the evidence. It is sufficient to say that there was abundant evidence, both competent and sufficient to submit to the jury, and, as found by the jury, to support the exact verdict; and so far as appears from the record in this case there was no reversible error on the part of the court in giving or refusing charges, or in denying the motion for a new trial.

We are not prepared to say that the verdict of the jury was not in accordance with the evidence. We are unable to find any material issue involved in this case as to which there was not sufficient evidence to support the verdict of the jury.

The judgment of the city court is affirmed.

DOWDELL, C. J., and SIMPSON and DENSON, J.J., concur.

[City Council of Montgomery, et al. v. Bradley & Edwards.]

**City Council of Montgomery, et al.
v. Bradley & Edwards.**

Injury to Stock From Defective Streets.

(Decided Feb. 4, 1909. 48 South. 809.)

1. *Municipal Corporations; Defect in Street; Duty of City.*—Where a city permits an unguarded pit to remain in a street, it violates its duty to keep its streets in a safe condition.

2. *Instructions.*—The issue being whether the defendant city failed to put up safe guards or barriers around the pit in a street, a charge which submits to the jury the question as to whether such city took reasonable precautions to prevent injury, was inapplicable to the issues as well as submitting to the jury a legal question, and its refusal was proper.

3. *Same.*—A charge asserting that a defendant city is not liable for leaving a hole in a street unguarded, if the circumstances surrounding it were such as to put a person exercising reasonable care upon notice of its existence, does not hypothesize any knowledge of such surrounding circumstances on the part of the plaintiff whose property was injured, and is, therefore, properly refused.

4. *Same; Contributory Negligence; Duty to Observe Defect.*—One using a street is not required to be on the lookout for obstructions or defects in the streets, but has the right to assume that the street is in proper condition.

5. *Same.*—One traveling on horseback along the street and leading mules, is under no duty to look ahead all the while to avoid defects in the street.

6. *Charge of Court; Instructions; Assumption of Facts.*—Where the only physical circumstances surrounding a hole in the street was the dirt taken from the excavation, and the evidence was in conflict as to this, a charge asserting and assuming that there were circumstances around the hole, is properly refused.

7. *Appeal and Error; Assignment; Insistence; Waiver.*—Errors assigned but not insisted on are considered to be waived.

APPEAL from Montgomery City Court.

Heard before Hon. A. D. SAYRE.

Action by Bradley & Edwards against the city council of Montgomery and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

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The case made by the complaint is that Barrett was employed by Nathan Griel and the corporation of Griel Bros. Company to make certain water connections, and that by permission of the city council Barrett made an excavation in the street, about 4 feet in diameter and about 14 feet deep, and left the excavation unguarded and unattended, into which plaintiffs' mule fell and was killed. The evidence sufficiently appears in the opinion of the court.

The charges refused to the defendant are as follows:

"(2) If the jury believe from the evidence that the defendant Barrett took reasonable precaution to warn the public using this street of the existence of the hole into which the mule fell, then the jury must find for the defendant.

"(3) If the circumstances surrounding the hole into which plaintiff's mule fell were such as to put a person exercising reasonable care upon notice of the existence of such hole, then the jury must find for the defendant.

"(4) If the physical circumstances surrounding the hole into which the plaintiff's mule fell were such as to put a person in the place of Bradley, exercising reasonable care, upon notice of the existence of such hole, then the jury must find for the defendant.

"(5) If the circumstances surrounding the hole into which plaintiffs' mule fell were such as to put a person using the highway, occupying the place occupied by Bradley and exercising reasonable care, upon notice of the existence of such hole, then the jury must find for the defendant.

"(6) If the jury believe from the evidence that the accident resulting in the mule's death was proximately due to the failure of the witness Bradley to look ahead of him while in charge of the mules, the jury must find for the defendant."

[City Council] of Montgomery, et al. v. Bradley & Edwards.]

Charges 7, 8, and 9 are the affirmative charges in varying forms.

C. P. MCINTYRE, and S. H. DENT, JR., for appellant. All the law imposed upon Barnett was to take reasonable precaution to warn the public of the existence of the hole, hence, charge 1 should have been given.—*M. & A. of Birmingham v. McCary*, 84 Ala. 469. Charge 2 should have been given.—*M. & A. of Birmingham v. Starr*, 112 Ala. 98. Charge 3 should have been given.—*Mayor, etc., v. Tayloe*, 105 Ala. 170. On the above authorities the other charges requested should have been given.

HOLLOWAY & BROWN, for appellee. Each of the refused charges constituted incorrect statements of the law, applicable to this case. It was perfectly legal and natural that Bradley should have been looking back at his mules a part of the time.—*Wadsworth v. Williams*, 101 Ala. 265; *Crawford v. The State*, 112 Ala. 1. Charges must be predicated upon the issues joined.—*Bir. Ry. L. & P. Co. v. City Stables Co.*, 119 Ala. 615. A municipal corporation disregards one of its plain duties when it permits an ungarded pit to remain in a public thoroughfare.—*Birmingham v. McCary*, 84 Ala. 469; *Birmingham v. Lewis*, 92 Ala. 352; *Lord v. City of Mobile*, 113 Ala. 360. The granting of the permit to Barrett to make the water connection was a sufficient notice to the city of the dangerous character of the work it authorized.—*District of Columbia v. Woodbury*, 136 U. S. 450. Travelers on the street may presume that it is in proper condition for travel.—*Birmingham v. Tayloe*, 105 Ala. 170. Plaintiff was not guilty of contributory negligence.—*Montgomery v. Reese*, 146 Ala. 410; *Montgomery v. Wright*, 77 Ala. 411; *Mayor, etc., v. Starr*,

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112 Ala. 98; *Bradford v. Anniston*, 92 Ala. 346; *Mobile v. Shaw*, 43 South. 394.

DOWDELL, C. J.—This is an action for damages for the killing of a mule, caused by the alleged negligence of the defendants. The general issue and contributory negligence were pleaded in short by consent. The assignments of error are based on the refusal of the trial court to give written charges numbered from 2 to 9, inclusive.

The negligence as charged in the second count of the complaint consisted in the failure of the defendants "to put up any proper safeguards or barriers to prevent animals, persons, or vehicles passing along said street from danger of falling therein;" that is, into the hole, 4 feet in diameter and 14 feet deep, which had been dug by the defendant Barnett by permission of the city council in a public street of the city. The evidence is free from conflict as to the injury and as to how it occurred. It is likewise free from conflict that no "safeguards or barriers were put up to prevent animals, etc., from falling" into the hole. It is insisted as a defense by the defendants that a man was stationed at the hole to warn the public of its existence and danger, and that such person gave warning to the plaintiff. The evidence in this respect, however, was in conflict. There was evidence on the part of the defendants tending to show that the dirt taken from the excavation was around the hole to about 3 feet high, while the evidence on plaintiff's part tended to show that the dirt taken from the excavation was thrown on the side next to the sidewalk, and was not around the hole.

There is no question as to the duty under the law resting on the municipality to keep its streets in safe condition for public travel and uses. This duty was im-

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posed upon the municipality by its charter.—Acts 1892-93, p. 368. “A municipal corporation disregards one of its plainest duties when it permits an unguarded pit to remain in a city thoroughfare, where of necessity it is a constant peril to travelers.”—*Mayor and Aldermen of Birmingham v. McCary*, 84 Ala. 469, 4 South. 630; *Mayor and Aldermen of Birmingham v. Lewis*, 92 Ala. 352, 9 South. 243; *Lord v. City of Mobile*, 113 Ala. 360, 21 South. 366.

Charge 2, requested by the defendants, was properly refused. This charge not only ignores the duty that rested on one of the defendants, the city council of Montgomery, but refers to the jury to determine what constitutes a reasonable precaution, a question of law. Moreover, charges must be predicated upon the issues joined, which this charge does not do.—*Birmingham Ry. Co. v. City Stables Co.*, 119 Ala. 615, 24 South. 558, 72 Am. St. Rep. 955. The issue as made by the pleadings was the failure of the defendants to put up safeguards or barriers to prevent animals, etc., from the danger of falling into the hole, and not the failure to take “reasonable precautions.”

Charges 3, 4, and 5 are substantially the same. Each of these is faulty in assuming that there were “circumstances surrounding the hole into which the plaintiff’s mule fell.” When the charge is referred to the evidence in the case, which must always be done, the only “circumstances” mentioned “surrounding the hole” was the dirt taken from the excavation, and the evidence as to this was in conflict. Moreover, the charge fails to hypothesize any knowledge or notice on the part of the plaintiffs of the “surrounding circumstances.” The plaintiff Bradley had the right to assume that the street was in a proper condition for use, and was under no duty to be on the lookout for the pit in the street, nor

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was he chargeable with culpable negligence in not discovering it.—*Mayor and Aldermen of Birmingham v. Taylor*, 105 Ala. 170, 16 South. 576.

Charge 6, refused to the defendants, when referred to the evidence, was palpably bad. Bradley, traveling, as he was, on horseback and leading several mules attached to a halter, was under no duty to be looking forward and ahead of him all the time. The very manner of his traveling justified him as a reasonable and prudent person in looking backward to the mules he was leading at times, as well as forward. Moreover, there is no evidence that Bradley failed to look ahead of him while in charge of the mules.

Charges 7, 8, and 9, refused to the defendants, were each the general affirmative charge, varying only in form. The assignments of error predicated on the refusal of these charges are not insisted on, and therefore require no further comment.

We find no error in the record, and the judgment is affirmed.

SIMPSON, ANDERSON, DENSON, and MAYFIELD, JJ., concur.

McLemore v. City of West End.

Damages on Account of Defective Streets.

(Decided Feb. 2, 1909. 48 South. 663.)

1. *Municipal Corporations; Streets; Duty to Repair.*—A city is under the duty to keep its streets in reasonably safe repair to their full width.

2. *Same; Defective Street; Injury; Proximate Cause.*—Where a city negligently fails to repair its streets, if the person injured is not negligent, and if the injury would not have occurred, but for the defect, it is liable for such injury caused by such defect, even

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though the injury would probably not have happened, but for an intervening or concurring cause for which neither party is responsible, such as a horse becoming frightened or unmanageable.

3. *Pleading; Amendment; New Cause of Action.*—Where the complaint alleged that the defendant city negligently allowed a wire fence to be maintained in a street, and that plaintiff was injured while riding along the street by his horse becoming unmanageable and running into the fence, it is not substituting an entirely new cause of action to allow the substitution of the word, frightened, for the word, unmanageable.

(Tyson, C. J., Dowdell and Simpson, JJ., dissent.)

APPEAL from Birmingham City Court.

Heard before Hon. C. W. FERGUSON.

Action by G. B. McLemore against the City of West End. From a judgment for defendant on demurrer to the complaint, plaintiff appeals. Reversed and remanded.

The sixth amendment, alluded to in the opinion, is an amendment to the third count of the complaint by striking therefrom the word "unmanageable," where it occurs therein, and inserting in lieu thereof the word "frightened." The other pleadings and the rulings thereon sufficiently appear in the opinion.

B. M. ALLEN, for appellant. The statutes of Alabama in regard to amendments are *very liberally construed*.—*Mahan v. Smitherman*, 71 Ala. 563; *Beavers v. Hardie*, 59 Ala. 372; *Robinson v. Darden*, 50 Ala. 71; *Burkham v. Mastin*, 54 Ala. 122; *Nelson v. Webb*, Id. 436; *Boardman v. Parrish*, 56 Ala. 54. Rulings on motions to strike pleadings can be presented for review only by a bill of exceptions.—*Randall v. Wadsworth*, 130 Ala. 633; *Dothan v. Ward*, 132 Ala. 380, Municipal corporations are liable for obstructions of streets or thoroughfares when negligently permitted or allowed in said municipality.—*Tayloe v. Mayor and Alderman of Birmingham*, 105 Ala. 170; *Starr v. Mayor and Alderman of Birmingham*, 112 Ala. 98; *State v. Mayor*

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and *Alderman of Mobile*, 5 Porter 279; *Hoole & Paullin v. Attorney General Ex. Rel.*, 22 Ala. 190; *Costello v. State*, 108 Ala. 45; *Stathakis v. State*, Id.; *Papalexanderakis v. State*, Id.; *Whaley v. Wilson*, 112 Ala. 627; *Bank v. Tyson*, 133 Ala. 459; *Cohen et als., Admr. v. Mayor, etc., of N. Y.*, 4 L. R. A. 406; *Kennedy v. New York*, 73 N. Y. 365; *McCauley v. New York*, 67 N. Y. 602; *Ring v. Cohoes*, 77 N. Y. 83; *Kunz v. Troy*, 104 N. Y. 344; 22 L. R. A. 393, 148 Ill. 51; *City of Denver, et al. v. Sherret*, 5 Amer. Neg. Reps 520.

The public is entitled to the use of the entire streets, free from obstruction or hindrance.—4 L. R. A. 406 *Supra*; *Lincoln v. Boston*, 3 L. R. A. 257, Note; *Costello v. State*, 108 Ala. 45. The negligence of others than the defendant cooperating to cause the injury does not relieve the defendant, even though without the agency of both causes the injury would not have occurred.—28 L. R. A. 696; (54 Kan. 316); *Union St. Ry. Co. v. Stone*, 54 Kan. 83; *Griggs v. Fleckenstein*, 14 Minn. 81; 100 Amer. Dec. 199; *Oil Creek & A. R. Co. v. Keighron*, 74 Pa. 316.

C. B. POWELL, for appellee. No brief came to the Reporter.

DENSON, J.—The original complaint contained four counts, in which it was averred, in varying form, that the duty rested upon the city of West End, a municipal corporation, to keep its streets in reasonably safe condition; that it had negligently allowed a wire fence to be maintained in a street of the city; and that the plaintiff, while riding on horseback along the street, was injured, by his horse becoming unmanageable and running into the fence, throwing the plaintiff, breaking his leg, and otherwise injuring him. The general issue

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was pleaded; and after the introduction of some of plaintiff's evidence, which tended to show that his horse, at the point described in the complaint, became frightened, and unmanageable by reason of fright, and by coming into contact with the fence was thrown upon the ground, and upon or against plaintiff's leg, breaking it, plaintiff amended his complaint by averring that the horse fell against the fence, and in falling fell upon the plaintiff's leg, and further offered to amend third count by striking out the word "unmanageable" and inserting in lieu thereof the word "frightened." The court, upon the motion of defendant, struck this latter amendment from the file as a departure from the original complaint. The plaintiff excepted to this ruling, and then, with leave of the court, amended the third count by adding, after the word "unmanageable," where it occurs in said count, the words "by reason of fright." The defendant demurred to the complaint as amended, upon the grounds that the complaint set up a new cause of action, that the fence being out in the street was not the proximate cause of the injuries complained of, and that the complaint failed to show any duty upon the part of the defendant in relation to the fence. The demurrers were sustained, and, the plaintiff declining to plead further, judgment was rendered for the defendant.

The duty of municipal corporations to keep their streets and sidewalks in a reasonably safe state of repair for public use is too well established to admit of further controversy; and this duty extends to the whole width of these public thoroughfares.—*City Council of Montgomery v. Reese*, 146 Ala. 410, 40 South. 760. If a municipality has been negligent in the discharge of of such a duty, and the person injured is not at fault, it is liable (according to the weight of authority) where the injury would not have occurred but for the obstruc-

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tion or defect. It cannot excuse its culpability by saying that the injury possibly, or even probably, would not have happened but for the intervention of a concurring cause, such as a horse becoming unmanageable through fright, for which neither party is responsible.—Elliott on Streets, § 615, and authorities there cited; *Ring v. City of Cohoes*, 77 N. Y. 88, 33 Am. Rep 574. The rulings upon the demurrers to the complaint are opposed to these principles, and must work a reversal of the judgment of the court below.

The court erred, also, in striking the “sixth amendment” to the complaint. It did not create an entirely new cause of action, as is assumed by the motion, and was clearly admissible.

Reversed and remanded.

ANDERSON, McCLELLAN, and MAYFIELD, JJ., concur.
TYSON, C. J., and DOWDELL and SIMPSON, JJ., dissent.

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Action for Damages for Defective Bridge.

(Decided Dec. 14, 1908. Rehearing denied Feb. 18, 1909.
48 South. 679.)

1. *Municipal Corporation; Presentation of Claim; Torts.*—A claim against the city of Montgomery for injuries suffered on August 1907, was properly presented under the city charter, since the municipal Code act of that year had not become operative, and if operative provided against any alteration of rights or remedies accruing or existing under previous enactment.

2. *Accord and Satisfaction; Plea.*—A plea of accord and satisfaction which fails to allege either a promise given or an acceptance, or anything parted with in the premises by either party is insufficient against demurrer.

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3. *Damages; Personal Injuries; Services of Physician.*—Where the complaint alleges expenses incurred in employing medical aid and buying medicine, it is competent to show the reasonable value of the services of plaintiff's physician.

4. *Appeal and Error; Questions Reviewable; Necessity for Ruling.*—Where the trial court did not rule on objection to the testimony of a physician that he did not consider plaintiff responsible but stated that the witness might give his professional opinion as to whether she was irrational, to which the defendants attorney excepted, does not present for review on appeal the objection interposed to the testimony.

5. *Trial; Objection to Evidence; Time.*—After a question has been answered an objection to the question comes too late.

6. *Costs; Prior Suit.*—Where it was conceded that the costs of a prior suit which had been dismissed by plaintiff, had been satisfied, it was proper to deny a motion to stay further proceedings in the subsequent suit because the cost of the former action has not been paid.

7. *Trial; Verdict; Certainty.*—Where the verdict was for the plaintiff assessing damages at "3000.00" it was not so defective as not to support the judgment because a dollar mark or the word dollars, was not supplied.

8. *Damages; Personal Injury; Excessive.*—A verdict and judgment for \$3,000.00 is not excessive where the plaintiff was permanently injured in the leg, suffered great mental pain and distress, loss of earning capacity, and incurred large doctor's bills.

APPEAL from Montgomery City Court.

Heard before Hon. A. D. SAYRE.

Action by Eliza Shirley against the city of Montgomery for damages for injuries received on account of a defective bridge. Judgment for plaintiff in the sum of \$3,000.00, and defendant appeals. Affirmed.

C. P. McINTYRE, for appellant. The court should have stayed the proceedings until the costs in the former suit had been paid.—*Hamilton v. Maxwell*, 119 Ala. 23. The court erred in overruling the demurrers to the complaint.—*Schroder v. Colbert County*, 66 Ala. 137; *Barratt v. City of Mobile*, 129 Ala. 179; Secs. 1 and 2, Acts 1907, p. 791. The court erred in sustaining demurrers to plea 1.—*Authorities*, supra. The court erred in sustaining demurrers to plea A.—*Smith v. Elrod*, 122 Ala. 269. The court erred in permitting Dr. Montgomery to

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state the reasonable value of his services to the plaintiff.—*Lewis v. Paul*, 42 Ala. 136; 13 Cyc. 189. The court erred in permitting Dr. Montgomery to state that at times plaintiff was irrational, as he did not qualify as an expert.—*Gunter v. The State*, 83 Ala. 96; *Parsons v. The State*, 81 Ala. 577; *Ford v. The State*, 71 Ala. 385. The suit was improperly brought in the name of Mrs. Shirley, as the sworn statement shows that her name was Woodall.—*Paymer v. Fletcher*, 29 Ala. 470; *A. G. S. R. R. Co. v. Burgess*, 119 Ala. 555.

HILL, HILL & WHITING, for appellee. The court properly overruled the demurrer to the complaint.—Secs. 1047, 1048 and 1050, Code 1907. The court properly sustained demurrers to plea A.—1 Cyc. 313. The court did not err in reference to Dr. Montgomery's testimony, as the witness never answered the question.—*L. & N. R. R. Co. v. Maybury*, 132 Ala. 521; *Sanders v. The State*, 134 Ala. 84. The doctor qualified as an expert. It was competent to prove plaintiff's health prior to her injury.—*Dowling v. The State*, 44 South. 408. The verdict was intelligent.—*Wiggins v. Witherington*, 96 Ala. 535; *Hopkins v. Orr*, 124 U. S. 510. The verdict was not excessive.—*Southern Ry. Co. v. Crowder*, 130 Ala. 256.

McCLELLAN, J.—The action is for damages for an injury suffered on account of a defect in a bridge in a public street, which the municipality was bound to keep in repair. Plea 1 proceeds on the theory that the method for the presentation of this claim should have been as is provided in the Municipal Code (Acts 1907, pp. 790 et seq.), a method different from that prescribed in the charter of the city of Montgomery and pursued in this instance. The injury was suffered in August, 1907.

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We have held that the Municipal Code did not go into effect, except as its operation was accelerated under section 199 of the Municipal Code, until September, 1908.—*Ward v. Parker*, 154 Ala. 227, 45 South. 655. Independent of this, however, the second paragraph of section 3 of the Municipal Code evidently contemplated no alternation of rights or remedies accruing or existing under enactments in operation before the Municipal Code was enacted. Accordingly the plea was properly stricken on demurrer; and for like reason the demurrers to the complaint were correctly overruled.

Plea A, as originally filed, undertook to set up as an accord executed, or an accord and satisfaction, merely an executory—unexecuted in any respect—agreement to pay the claim of the plaintiff at a certain sum, upon approval thereof by the city council of Montgomery. No promise was averred to have been given, much less accepted, and nothing was parted with in the premises, by either party.—*Cobb v. Malone*, 86 Ala. 571, 574, 6 South. 6; *Smith v. Elrod*, 122 Ala. 269, 24 South. 994, 1 Cyc. pp. 311, 313, 314. The demurrer thereto was, hence, properly sustained. The granting of the motion to exclude all the testimony relating to the alleged settlement before mentioned was without prejudice to the appellant. Amended plea A, then averred tender of the agreed sum and the acceptance of the promise of the city by Calloway for appellee, is, in these material aspects entirely without support in the evidence.

Each count of the complaint contained, as an element of damages accruing to appellee by reason of her injury, the averment of expenses in employing medical aid and buying medicine. Accordingly it was competent, against the objection that such damages are not claimed, to show by Dr. Montgomery what was a reasonable bill for the services rendered her by him.

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During the examination of Dr. Montgomery the bill recites this: "The attorney for the plaintiff asked the following question: 'How long would the irrational spells last? A. It was continual for probably three or four weeks. I did not consider that she was responsible for her actions. The attorney for the city objected, and moved to exclude the statement that the doctor did not consider her responsible. The court then said: 'I will let him give his professional opinion that she was irrational.' The attorney for the city then and there excepted.'" We have quoted the bill in this particular to demonstrate that the court never ruled upon the motion to exclude; and hence no ruling for review is presented.

The objection to the question, to Mrs. Griggs, as to plaintiff's health before the injury, was interposed, the record shows, after the witness had answered the question. It was then too late.—*Dowling v. State*, 151 Ala. 131, 44 South. 403.

The motion to stay the prosecution of this action, because the cost of a previous action, upon the same cause and against this defendant, which was dismissed by plaintiff, had not been paid, was properly overruled upon the conceded fact that such costs had been satisfied.

The verdict rendered was as follows: "We the jury find for the plaintiff and assess the damages at 3,000.00." The judgment rendered was for \$3,000. On motion for new trial it was objected that the verdict was indefinite in the assessment of the amount of the damages; and it is now argued that a dollar mark or the word "dollar" must be supplied, and that without warrant, in order to render the verdict sufficiently certain. In the construction of verdicts it was early declared here that "the utmost favor has always been extended to verdicts, and they are not construed strictly, as pleadings are."—*Moody v. Keener*, 7 Port. 233. And in *Toulmin v.*

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Lesesne, 2 Ala. 363, it said: "Courts will always mold and construe a verdict as to make it legal if possible, and will never give to it the opposite construction, unless forced by the terms in which it is expressed."—*McGowan v. Lynch*, 151 Ala. 458, 44 South. 573. In the light of this rule of favor to verdicts, we feel no hesitancy in affirming that the period preceding the two last ciphers in the line of figures written in the verdict was intended by the jury, and must be so construed, as indicating that the figures to the right of the period refer to cents and those to the left to dollars, thus making the verdict for the sum stated in the judgment. Aside however, from the influence accorded the rule, we think that the method of numerical statement employed by this jury could be sustained by recourse to the common knowledge on the subject. The division of a line of figures by a period or reverse comma are the most common methods of indicating that the figures to the right thereof are cents and those to the left dollars. The amount of the verdict in this case is large and unreasonable, or fair and reasonable, as those conclusions are invited by a belief or disbelief, respectively, of the testimony presented to the jury bearing upon the extent and consequences of the injury suffered. The jury had before them testimony which, if credited, showed a case of permanent injury in the leg, great pain and mental distress endured, loss of earning capacity at least for a period, and considerable expense incurred for medical aid and medicines. Under such circumstances we cannot disturb the jury's finding.

We have considered all the assignments of error insisted upon. There is no prejudicial error in the record, and the judgment is affirmed.

Affirmed.

DOWDELL, ANDERSON, and DENSON, JJ., concur.

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Damages for Delay in Transmission of Telegram.

(Decided April 15, 1909. 49 South. 252.)

1. *Telegraphs and Telephones; Failure to Promptly Transmit; Damages; Mental Suffering.*—Where there is no evidence tending to show that if the telegram had been promptly transmitted and an answer received, it would have given any information different from that which plaintiff already had, a recovery cannot be had for mental anguish, and the court properly excluded evidence relative thereto.

2. *Same; Exemplary Damages.*—Under the facts in this case the delay of the operator in sending the telegram cannot be made the basis for exemplary damages.

APPEAL from Tuscaloosa County Court.

Heard before Hon. H. B. FOSTER.

Action by R. M. Leland against the Western Union Telegraph Company for failure to promptly transmit a telegram. From a verdict for plaintiff for the price paid for the transmission of a telegram and the costs defendant appeals. Affirmed.

OLIVER, VERNER & RICE, for appellant. The demurrers to the 3rd count of the complaint were not well taken.—*L. & N. R. R. Co. v. Orr*, 121 Ala. 489; *Martin's Case*, 117 Ala. 367; *Crocker's Case*, 95 Ala. 412; *R. R. Co. v. Lee*, 92 Ala. 262. Under the facts in this case, mental anguish was an element of recoverable damage.—*W. U. Tel. Co. v. Westmoreland*.—44 South. 382; *Same v. Haley*, 143 Ala. 586; *Same v. Crumpton*, 138 Ala. 643; *Same v. Long*, 41 South. 965; *Same v. Henderson*, 89 Ala. 510.

GEORGE H. FEARONS, and HENRY FITTS, for appellee. The court properly sustained demurrers to the 3rd

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count.—*W. U. Tel. Co. v. Powell*, 45 South. 73; *Cent. of Ga. Ry. Co. v. Foshee*, 125 Ala. 226; *M. & C. R. R. Co. v. Martin*, 117 Ala. 367; *Southern Ry. Co. v. Prather*, 119 Ala. 588. On these authorities, mental anguish was not an element of recoverable damages

SIMPSON, J.—This action was brought by the appellant against the appellee for damages on account of failure to transmit promptly a telegram. The allegations of the complaint and the evidence show that plaintiff's son was at Vossburg, Miss, under treatment; that on December 27, 1905, one Ed. Robbins, who had charge of said son, and who had agreed to keep plaintiff advised of his condition, sent to plaintiff, at Tuscaloosa, Ala., a telegram in these words: "Doctor advises Henry's condition worse. Shall we tap to preserve life? Answer." Plaintiff replied, in a telegram to Robbins: "Call Dr. Harbin. Have him do what he thinks best to save child." These telegrams were promptly delivered. At 4 o'clock in that afternoon plaintiff delivered for transmission, and paid for same, another telegram, as follows: "Wire Henry's condition seven to-night. Be down on number one." The office at Vossburg closed at 7 p. m. About 7 o'clock plaintiff went to the office in Tuscaloosa and inquired for an answer. The operator at first led him to believe that he was waiting for an answer; but, after plaintiff had waited about two hours, the operator admitted that he had forgotten to send said telegram, and it was not in fact delivered until the next morning, after the plaintiff had reached Vossburg. Plaintiff found his son better when he reached there, and the operation was not performed until after plaintiff reached the place.

The gravamen of plaintiff's claim is for mental suffering until he reached the place where his son was. By

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demurrers and charges the question is raised whether plaintiff is entitled to recover for mental suffering. The court charged the jury that the plaintiff was entitled to recover the cost of the telegram, with interest, and, on the request of the defendant, charged the jury that, under the evidence, plaintiff was entitled to recover only the cost of the telegram with interest. The jury returned a verdict for 75 cents and costs, and the plaintiff appeals.

The Supreme Court of Texas has considered this phase of the question of damages for mental suffering, perhaps, more fully and frequently than that of any other state; and it holds that, for the mere continuance of mental anxiety, which might have been relieved by the prompt delivery of a telegram, the failure of the company to deliver the telegram cannot be said to be the proximate cause of the mental suffering, and the plaintiff cannot recover.—*Rowell v. W. U. Tel. Co.*, 75 Tex. 26, 12 S. W. 534; *W. U. Tel. Co. v. Edmonson*, 91 Tex. 206, 42 S. W. 546 (see, also, note on this case, 66 Am. St. Rep. 873); *Akard v. W. U. Tel. Co.* (Tex. Civ. App.) 44 S. W. 538; *McCarthy v. W. U. Tel. Co.* (Tex. Civ. App.) 56 S. W. 568; *W. U. Tel. Co. v. Griffin*, 93 Tex. 530, 56 S. W. 744, 77 Am. St. Rep. 896; *W. U. Tel. Co. v. Bass*, 28 Tex. Civ. App. 418, 67 S. W. 515; *Johnson v. W. U. Tel. Co.*, 14 Tex. Civ. App. 536, 38 S. W. 64; *W. U. Tel. Co. v. O'callaghan*, 32 Tex. Civ. App. 336, 74 S. W. 798; *W. U. Tel. Co. v. Reed*, 37 Tex. Civ. App. 445, 84 S. W. 296. The Supreme Court of North Carolina holds the same doctrine.—*Sparkman v. W. U. Tel. Co.*, 130 N. Co. 447, 41 S. E. 882. The Supreme Court of Tennessee also so decides the question; the court, after announcing its adherence to the rule of damages for mental suffering in other cases, saying: "The rule upon which such damages are allowed is of difficult application, and

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its policy and soundness has been questioned in many courts of high authority, and we do not deem it proper to extend it to other cases than those to which it has been applied in this state. This also seems to be the tendency of other courts of last resort, in states where the mental anguish doctrine prevails."—*W. U. Tel. Co. v. McCaul*, 115 Tenn, 103, 90 S. W. 856. The Supreme Court of Kentucky also holds that the failure to deliver a message of inquiry about plaintiff's sick sister was not the proximate cause of his mental anguish.—*Taliferro v. W. U. Tel. Co.* (Ky.) 54 S. W. 825.

Our own court has not passed upon this question, but has recognized the importance of not extending the doctrine of recovering damages beyond the limits of what has already been decided, saying, in a case where the line was drawn as to the degree of relationship necessary, in cases of absence from bedside or funeral: "To do so would, in our judgment, tend to promote and encourage a species of litigation more or less speculative in its nature and unjust and oppressive in its results."—*W. U. Tel. Co. v. Ayers*, 131 Ala. 394, 31 South. 78, 90 Am. St. Rep. 92. The only case which we have seen, taking a view of this subject different from that taken by the cases cited, is the case of *Willis v. W. U. Tel. Co.* 69 S. C. 531, 48 S. E. 538, 104 Am. St. Rep. 828. That case does not cite any authority on the question of mental anguish, but is based on the statute of South Carolina, providing for damages "for mental anguish or suffering," and on the fact that the evidence showed that, if the telegram had been delivered, an answer would have been received which would have relieved the anguish or suffering.

Without deciding this point, even under the *Willis Case* and our own previous decision in this case, there is no evidence in this case tending to show that, if an

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answer had been received, it would have given any information different from that which he already had.—*W. U. Tel. Co. v. Leland*, 156 Ala. 339, 47 South. 62. The plaintiff in this case was not entitled to recover for mental anguish. "There was nothing in the case upon which to base a recovery for exemplary damages."—*Robinson v. W. U. Tel. Co.* (Ky.) 68 S. W. 656, 57 L. R. A. 611, 613; *McAllen v. W. U. Tel. Co.*, 70 Tex. 243, 7 S. W. 715, 717; *Koperl v. W. U. Tel. Co.* (Tex Civ. App.) 85 S. W. 1018, 1019; *W. U. Tel. Co. v. Westmoreland*, 151 Ala. 319, 325, 44 South. 382 et seq.

There was no error in excluding the testimony in regard to mental anguish.—*W. U. Tel. Co. v. Avie Northcutt*, 158 Ala. 539, 48 South. 553.

The points discussed dispose of the case, and it is unnecessary to refer to the questions on pleadings.

The judgment of the court is affirmed.

Affirmed.

DOWDELL, C. J., and DENSON and SAYRE, JJ., concur.

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Damages for Failure to Promptly Deliver Telegram.

(Decided Feb. 4, 1909. 48 South. 676.)

1. *Telegraphs and Telephones; Transmission of Message; Failure to Deliver.*—It is immaterial whether the relationship between the parties is revealed to the telegraph company's agent when the message is delivered. If the wording of the message shows the urgency of prompt transmission, and charges defendant with notice of the relationship and that plaintiff would be subjected to physical pain and mental suffering as a natural consequence of its failure to promptly deliver the telegram.

2. *Same; Damages.*—A plaintiff is entitled to recover damages for a failure to deliver a message, for the pain resulting from the absence of his mother's care, when but for the breach of the contract she

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might have been with him, where the message notified defendant telegraph company that plaintiff was badly injured and carried with it notice that the sendee was plaintiff's mother and apprised defendant of the necessity of prompt delivery.

3. *Appeal and Error; Judgment Rendered; Evidence.*—Where the cause was tried by the court without the intervention of a jury on the testimony of witnesses examined ore tenus and the evidence was sufficient to support the judgment, it will not be disturbed on appeal.

APPEAL from Tuscaloosa County Court.

Heard before Hon. HENRY B. FOSTER.

Action by John Beal, Jr., against Postal Telegraph & Cable Company for damages for the failure to promptly deliver a telegram. Judgment for plaintiff and defendant appeals. Affirmed.

VANDEGRAAF & SPROTT, for appellant. Under the facts in this case, the damages claimed for physical suffering should not have been allowed as an element of recovery.—*W. U. Tel. Co. v. Lovett*, 58 S. W. 204; *same v. Reed*, 85 S. W. 1171; *Daugherty v. W. U. Tel. Co.*, 75 Ala. 168; *W. U. Tel. Co. v. Way*, 83 Ala. 542; *Burton v. Henry*, 90 Ala. 281; *Cagy v. W. U. Tel. Co.*, 37 Ind. App. 73; *W. U. Tel. Co. v. Westmoreland*, 44 South. 382; *Ala. Chem. Co. v. Geiss*, 30 South. 255.

HENRY FITTS, for appellee. This case should be affirmed on the authority of.—*Daugherty v. Am. U. Tel. Co.*, 75 Ala. 168; *W. U. Tel. Co. v. Way*, 83 Ala. 240.

DENSON, J.—The plaintiff, while engaged in mining coal near Sydney, Ala., was severely burned in an explosion which occurred in the mine on the 3d day of June, 1907. At 2 p. m. of the following day, at plaintiff's request, William James (Through a Mr. Henderson) delivered to the defendant company's telegraph office in the city of Birmingham, Ala., a message to be transmitted to plaintiff's mother, as follows, viz: "Bir-

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mingham, Ala., June 4, '07. Mattie Beal (colored), Tuscaloosa, Ala. John badly hurt wants to see you at Sydney coal mine. (Signed) Wm. James." The toll was paid in Birmingham for the transmission of the message, and the telegram was received by the defendant's operator at Tuscaloosa at 2:06 p. m., the same day it was delivered for transmission at the Birmingham office. As soon as it was received by defendant's operator at Tuscaloosa, he committed it to one of the company's messenger boys to be delivered to the addressee. The messenger made an ineffectual effort to find Mattie Beal, returned the message to the office about 45 Minutes after he received it. Thereupon, and about 4 p. m. of the same day, the operator at Tuscaloosa wired to the sender a service message, to the effect that Mattie Beal could not be found in Tuscaloosa. William James received that message, and mailed to Mattie Beal a special delivery letter, notifying her of plaintiff's condition. This letter Mattie Beal received early on the morning of Thursday, June 6th; and she left Tuscaloosa at 10 o'clock on the same morning, reaching plaintiff's bedside that afternoon, "about two hours by sun," where she found him in a very bad condition—which condition, as the evidence tended to show, was due in large part to lack of some one to nurse him. The evidence tended to show that the telegram was mailed by the operator in Tuscaloosa to the addressee, and that it was received by her husband on the 7th of June. It also showed that the addressee was a negro woman living within the company's delivery limits in Tuscaloosa, and that she had been living there for a period of seven years next before the time hereinafter referred to. The evidence tended to show that the messenger boy was derelict in not making delivery of the message, and that, if it had been promptly delivered, plaintiff's mother would probably have reached him on the night of June 4th.

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The action is *ex contractu*. Breach of contract, in the failure to deliver with reasonable dispatch, is alleged, and damages are claimed for physical pain and mental anguish, in addition to the toll paid for the transmission of the message. The assignments of error insisted upon relate to rulings of the court on the admissibility of testimony, to the action of the court in rendering judgment for the plaintiff, and to the overruling of defendant's motion for a new trial.

So far as the questions presented for decision are concerned, we are clear in our opinion that whether the relationship between Mattie Beal and the plaintiff was revealed to defendant's agents before or at the time the message was delivered for transmission is immaterial, for the reason that the wording of the message was such as to herald its own importance and the urgency of prompt delivery, and charged the defendant company with notice of the relationship that existed between the parties, and, further, that as a natural consequence of a failure to deliver it plaintiff would be subjected to physical pain and mental suffering. *Western Union Tel. Co. v. Henderson*, 89 Ala. 510, 7 South. 419, 18 Am. St. Rep. 148; *Western Union Tel. Co. v. Long*, 148 Ala. 202, 41 South. 965; *Western Union Tel. Co. v. Carter*, 85 Tex. 580, 22 S. W. 961, 34 Am. St. Rep. 826; *Western Union Tel. Co. v. Adams*, 75 Tex. 531, 12 S. W. 8557, 6 L. R. A. 844, 16 Am. St. Rep. 920; *Western Union Tel. Co. v. Edsall*, 74 Tex. 329, 12 S. W. 41, 15 Am. St. Rep. 835.

The rulings of the court on the admissibility of testimony are challenged, in brief of appellant's counsel, upon the notion that damages for physical pain are not within the rule of recoverable damages in this cause. It may be conceded that pain, the natural consequence of the injury itself, is not a proper basis for damages; but

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this is not the precise question here. Our question is: If plaintiff's pain was prolonged or augmented, on account of lack of the attention and soothing care of his mother during a period when, but for the breach of the contract to promptly deliver said message, she could and would have been present to minister to and care for him, should such pain be considered in estimating the amount of plaintiff's damages? The message in so many words notified defendant that the plaintiff was badly hurt; and if, as has been stated, its wording carried with it notice that the sendee was the mother of plaintiff, and also apprised defendant of the necessity of prompt delivery, we cannot see why, if plaintiff's pain might have been soothed or lessened by his mother's care and ministrations during a period when, but for the breach of the contract by the defendant, she might have been with him, such pain should not be said to have been a direct and proximate consequence of the breach of the contract, and within the contemplation of the parties. The court holds that it was, and that it was, consequently, within the rule of recoverable damages.—*Western Union Tel. Co. v. Church*, 3 Neb. (Unof.) 22, 90 N. W. 878, 57 L. R. A. 905; *Western Union Tel. Co. v. Cooper*, 71 Tex. 507, 9 S. W. 598, 1 L. R. A. 728, 10 Am. St. Rep. 772. The objections of the defendant to the testimony offered are limited to the grounds of irrelevancy and immateriality. From what we have said above, it follows that they were properly overruled.—3 Brick. Dig. p. 444, § 574.

The other assignments of error insisted upon call in question the judgment of the court rendered in favor of the plaintiff and the order overruling the motion for a new trial. The cause was tried, under the practice act applicable to the Tuscaloosa county court, by the court without the intervention of a jury; and on the testimony

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of witnesses, which were examined before the court ore tenus, we cannot say that the judgment rendered is plainly erroneous. On the contrary, there is sufficient evidence to support the judgment, and we shall, therefore, not disturb it.—*Woodrow v. Hawving*, 10 Ala. 240, 16 South. 720. Furthermore it cannot be said that the motion for a new trial should have been granted.

Let the judgment appealed from be affirmed.

Affirmed.

TYSON, C. J., and SIMPSON and MAYFIELD, JJ. concur.

Western Union Telegraph Co. v. Benson.

Damages for Failure to Promptly Deliver Telegram.

(Decided Dec. 17, 1908. Rehearing denied Feb. 5, 1909.
48 South. 712.)

1. *Telegraphs and Telephones; Operator as Agent of Sender.*—If a telegraph operator writes a message on one of the company's blanks, at the request of the sender, he becomes the sender's agent in the writing of the telegram binding the sender by the terms of the contract.

2. *Same; Delayed Message; Burden of Proof.*—Where the sender of a telegram imparted no information as to whether the sendee lived within or without the free delivery limit of the terminal office and paid no extra toll to secure delivery out of such limit and the sending operator had no information as to residence of the sendee, the duty is on the sender of the message, in an action for failure to promptly deliver the message, to show whether the addressee lived within the free delivery limits of the terminal office.

3. *Same; Instructions.*—Where there was an issue as to whether the company had exercised reasonable diligence within the free delivery limit to make a delivery of a telegram a charge asserting that the company's duty to make free delivery was conditioned on the addressee's residence within the free delivery limit, and that until that condition was shown the company was not in default, under the pleading and evidence, was properly refused.

4. *Same.*—A charge asserting that unless the addressee lived within the free delivery limits of the terminal office, the sender could not recover, tended to mislead the jury to believe that if the sender

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fails to show the location of the addressee's residence within the free delivery limit, he could not recover although the company did not exercise reasonable diligence in an effort to make the delivery within such limit.

5. *Same; Damages for Mental Anguish.*—Where a telegraph company negligently failed to deliver a message by one brother to another announcing the death of a third brother, the sender may recover damages for mental anguish.

6. *Same; Death Message; Notice of Relationship; Mental Anguish.*—Where the telegram announces a death and directs the sendee to come at once, the company is charged with notice of relationship between the parties, the consequence of a possible failure to deliver according to the terms of the contract, and that mental pain and anguish will probably result, where the sendee and decedent's surname are identical.

7. *Same; Damages Recoverable.*—Where the sender of a message, addressed to the sendee, announces the death of a brother of both, and summons the addressee to come at once, suffers mental pain from being deprived of the presence of the addressee before and during the burial of the brother as a proximate consequence of the failure of the company to promptly deliver the message, such pain is an element of damage recoverable by the sender; however, the mental anguish naturally arising from the death should not be confounded by the jury with that resulting from the company's negligence.

8. *Same; Mental Anguish; Evidence.*—It is not necessary that there be positive or direct evidence of mental pain such as expressions or exclamations indicating such suffering, to authorize a recovery for mental anguish caused by the company's negligent delay in the delivery of the death message; the jury may infer the same from an application of their own knowledge of human nature and their experience from the attendant facts and circumstances.

9. *Same; Jury Question.*—Even though there is evidence of mental suffering caused by negligent delay in the delivery of a death message, the question as to whether it existed is one to be left to the jury as a basis for damages.

10. *Same; Free Delivery Limits.*—Although the usual route in going from the telegraph office to the residence of the sendee was more than half a mile, yet if the residence of the sendee was within the half mile radius from the terminal office, which half mile radius constituted the free delivery limit of that office, the sendee was entitled to free delivery.

11. *Same; Delayed Message; Punitive Damages.*—For a breach of contract to promptly deliver a message, exemplary or punitive damages are not recoverable from a telegraph company.

12. *Same; Damages; Instruction.*—A charge asserting that if the defendant telegraph company's conduct in failing to deliver a message was such as to be wholly in disregard of the sender's right, the jury could consider that in assessing damages, authorized the recovery of exemplary or punitive damages, and should not have been given.

13. *Same; Evidence.*—Where the complaint charged that the addressee would have attended the funeral if the telegram had been

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promptly delivered, it was competent for the addressee to testify that he could have made connections with the train and would have gone to the funeral if he had received the message earlier.

14. *Same.*—In an action for failure to deliver a telegram promptly it was competent to show by the witness that witness asked the company's agent, who was looking for the sendee, whether the message was important or not; that the agent replied, he did not know whether it was; that witness told the agent he would deliver it; that the agent took the message away and that the witness told the agent where he could find the addressee.

15. *Charge of Court; Argumentative Instructions.*—A charge asserting that the jury should consider the fact that plaintiff was one of six living brothers and that five of them and all four of the sisters were at the burial, in determining whether plaintiff suffered great mental pain as the result of the absence of the sixth brother, was argumentative and properly refused. (The action being for damages for delay in delivering the telegram.)

16. *Same.*—A charge asserting that in permitting a recovery for mental suffering the law did not authorize the jury to guess at the amount, but requires them to consider very carefully the evidence and decide first whether plaintiff suffered any real mental anguish, and if the suffering was trifling, and such as men of ordinary manhood and self reliance would overlook, and ignore, substantial damages could not be awarded, is purely argumentative.

17. *Same.*—Charges asserting that in determining whether damages should be awarded for mental suffering, the jury must consider all the circumstances and recall all other aid and assistance plaintiff had at the funeral; that if as reasonable men the jury concluded that the plaintiff did not suffer any mental pain, they would violate their oaths by awarding damages greater than the toll paid, etc., are each argumentative and properly refused.

18. *Same; Confusing Instructions.*—A charge asserting that the allowance of damages for mental pain or anguish should be considered by the jury only after mature and careful deliberation, and that none could be awarded unless all the jurors agree that plaintiff actually suffered mental pain because the addressee was not at the funeral, and that the proper amount to be allowed the sender for such mental pain must be agreed on by all the jurors, and that if they were unable to agree on the amount to be allowed, they could award only nominal damages, is involved and confusing.

19. *Same.*—A charge asserting that the burden was on defendant to show when and where the message might have been delivered reasonably, and "your minds are left confused and uncertain as to whether ordinary and reasonable diligence would have succeeded in finding him, then your verdict must be for defendant," assumes that the jurors minds were confused and uncertain and was properly refused for that reason.

20. *Same; Unintelligible Instructions.*—A charge asserting that the burden was not on the company, but on the plaintiff "before you how" sendee might have been found within the free delivery limit, etc., is properly refused as uncertain and unintelligible.

21. *Same; Assumption of Fact.*—A charge assuming facts not shown undisputedly by the evidence is properly refused.

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22. *Same; Undue Prominence to Evidence.*—A charge asserting that if the jury believed the testimony of a particular witness, they must find certain things to be true, is properly refused as giving undue prominence to certain evidence and ignoring others.

23. *Same; Province of Jury.*—An instruction that directs the finding of certain facts on the belief of certain evidence is invasive of the province of the jury.

24. *Same; Unsupported by Pleading.*—Instructions are properly refused which charge upon issues raised by pleas to which demurrers have been sustained.

25. *Trial; Argument of Counsel; Reading From Reports.*—In the presentation of the law of the case to the court counsel may read the report of facts from another case in connection with the opinion in the case.

26. *Appeal and Error; Insistence on Assignment; Sufficiency.*—Statements in briefs that a specified instruction refused was correct on the effect of the evidence and could not be disputed; that specified instructions assert correct proposition of law and should have been given and that other specified instructions were supported by the evidence and should have been given, are not sufficient as insistent on such assignment to require their consideration by the Supreme Court.

27. *Evidence; Res Gestae.*—Where the sendee was blind and the message was read to him by the agent of the company before giving it to him, it was competent, as part of the *res gestae* of the delivery to show what the agent read to the addressee as the telegram.

APPEAL from Walker Law and Equity Court.

Heard before Hon. T. L. SOWELL.

Action by J. R. Benson against the Western Union Telegraph Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

The pleadings and the facts are sufficiently stated in the opinion of the court.

The following charges were requested by, and refused to, defendant:

“(3) I charge you that you cannot find a verdict for plaintiff if you believe plaintiff’s evidence, and if you believe further that Bill Benson did not live within the free delivery limits of defendant’s Carbon Hill office.”

“(15) I charge you that the burden rests upon plaintiff to prove to you reasonable satisfaction that Bill Benson did not live over one-half of a mile from the tele-

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graph office, and that unless you believe from the evidence that he lived within that distance you must find a verdict for the defendant.

“(16) I charge you that plaintiff’s only evidence with reference to the distance from Bill Benson’s house near Carbon Hill to the telegraph office in Carbon Hill is substantially set forth in the statement of Bill Benson to the effect that he lived somewhere between a quarter and a half mile, near a half a mile, from the depot, and that with this you are to weigh the testimony of all the other witnesses on that point, and from all the testimony determine the question of distance; and I charge you that unless you are reasonably satisfied that Bill Benson lived within the half-mile limit, then plaintiff has failed to meet the burden resting upon him.”

“(19) I charge you that the burden of proof as to whether Bill Benson lived within the free delivery limit rests upon plaintiff.”

“(23) I charge you that free delivery is a conditional obligation on part of the defendant, contingent upon Bill Benson’s residence being within the area of free delivery, and until that condition is shown the telegraph company is not in default under the pleadings and evidence in this cause.”

“(28) I charge you that you cannot assume that plaintiff suffered pain on account of his brother’s absence merely because his brother was not present at the funeral.”

“(30) I charge you that the fact that plaintiff was one of six living brothers, and that five of the brothers and all four of the sisters were present at the burial, may be considered by you in determining whether or not this plaintiff suffered great mental pain at the absence of the six brothers.”

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“(32) I charge you, gentlemen of the jury, that in allowing a recovery in certain instances for mental suffering the law does not authorize you to guess at the amount but does require you to consider very carefully the evidence, and decide first of all whether or not plaintiff suffered any real mental anguish, and if this suffering was trifling, and such as men of ordinary manhood and selfreliance would overlook or ignore, then you would be prohibited from awarding any substantial damages for the alleged mental suffering.

“(33) I charge you that the allowance of damages for mental pain or anguish is not to be considered by you, except after mature and careful deliberation, and you cannot award any such damages unless all of you shall agree that plaintiff actually suffered from mental pain because Bill Benson was not at the scene of the funeral as alleged, and the proper amount to be allowed plaintiff for such mental pain must be agreed upon by all of you, and if you are unable to agree on the question as to what amount should be allowed plaintiff, if anything at all, you cannot award anything but nominal damages.

“(34) I charge you that in deliberating upon the question as to whether you will award any damages at all to plaintiff for mental suffering you must consider all the circumstances and recall what other aid and assistance plaintiff had at the funeral, and if, as reasonable men, you conclude that plaintiff did not suffer any mental pain himself, you would be violating your oath if you awarded him any damages greater than 25 cents, the sum he paid for the message.”

“(37) There is no presumption whatever that plaintiff suffered mental pain simply because his brother was not present at George Benson’s funeral.

“(38) I charge you that there is no evidence in this case that plaintiff suffered any mental pain on account

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of the absence of his brother Bill Benson from the funeral.

“(39) I charge you that, before you can award any damages whatever to plaintiff for mental pain caused by his brother’s absence, you must carefully and with due regard for your solemn oaths consider what aid, comfort, and assistance Bill Benson would have rendered J. R. Benson individually on the day of George Benson’s funeral.

“(40) I charge you that you are authorized to consider the fact that there were present four sisters and five brothers at the funeral of George Benson in determining what aid, comfort, society, and assistance Bill Benson could have rendered J. R. Benson, had Bill Benson been present.”

“(12) In determining whether or not plaintiff suffered mental pain on account of the absence of Bill Benson, you must conclusively presume that plaintiff is a man of ordinary self-reliance and force of mind, and are not authorized to presume that he is any more emotional than any grown man of ordinary strength and firmness and manhood; and you must solemnly and conscientiously consider these facts before you can arrive at a just verdict.”

“(48) I charge you that the burden rests upon plaintiff to show when and where the message in question might reasonably have been delivered to Bill Benson within the free delivery limit of Carbon Hill, and your minds are left confused and uncertain as to whether ordinary and reasonable diligence would have succeeded in finding him then your verdict must be for the defendant.

“(49) I charge you that the burden is not upon the defendant, but upon plaintiff before you how Bill Benson might have been found within the free delivery limits

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of Carbon Hill, by a person not knowing him by name, and if your minds are confused and uncertain as to the movements of Bill Benson on July 3d, and as to the probability of being able to find him in the free delivery limits of Carbon Hill, your verdict must be for the defendant."

"(51) I charge you that if you are reasonably satisfied from the evidence that the defendant's messenger, S. D. Patterson, within a reasonable time after Bill Benson came within the free delivery limits of Carbon Hill, Ala., on the morning of July 3, 1907, went to the store of G. L. Wakefield with the message for the purpose of making delivery, and that the said Bill Benson was absent, then your verdict must be for the defendant.

"(52) I charge you that, if you believe the testimony of S. D. Patterson, then you must find that reasonable diligence was used by the defendant to deliver the telegram after Bill Benson came within the free delivery limit of the terminal office, and your verdict must be for the defendant, provided that you further find that the residence of said Bill Benson was more than one-half mile from defendant's office in the town of Carbon Hill.

"(53) I charge you that, in ascertaining the distance from defendant's office in Carbon Hill and the residence of Bill Benson, the route traveled from said office to said residence is to be considered, and not a direct line between said points.

"(54) I charge you that, in determining the distance between defendant's office in Carbon Hill and the residence of Bill Benson, you are to consider the most available route that could have been traveled between said points and not a direct line."

"(58) I charge you that under the evidence in this case there was no train leaving Carbon Hill after the message was delivered to defendant at Nauvoo, and the

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time that said Bill Benson came within the free delivery limits of defendant's office at Carbon Hill, by which said Benson could have come to Jasper, or any other point, and take a train that would have reached Nauvoo in time for him to have gone to George Benson's house before the funeral party left.

"(59) I charge you that, if the evidence is evenly balanced as to whether defendant was, or was not negligent in the delivery of the message, then your verdict must be for the defendant."

"(68) I charge you that the damage ordinarily resulting from the breach of contract to deliver messages of the kind in question do not include mental pain of the sender at being deprived of the addressee's consolation, and in order to entitle the sender to recover such peculiar damages it must be first shown that at the time of the receipt of the message for transmission the defendant had notice of the fact that mental pain to the sender would be the natural or probable result of its failure to deliver; and I charge you that the terms of the message in this case are not sufficient predicate to serve as the basis for the recovery of damages for mental pain caused the sender by being deprived of the addressee's consolation and solace.

"(69) I charge you that, if the evidence should disclose that the defendant did not use reasonable diligence in and about the transmission of the message in question, then Bill Benson, upon showing the necessary facts, might sue and recover damages for any mental pain he may have sustained by reason of his enforced absence from his brother's burial; but the message in this case did not disclose the fact that its purpose was for the purpose of obtaining for the sender the consolation and solace of Bill Benson, and I therefore charge you that no damages can be awarded to plaintiff which may have

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been caused him by his brother Bill's absence from the funeral.

"(70) I charge you that before plaintiff is entitled to recover damages for mental pain caused by the absence of his brother Bill, as alleged in the complaint, the evidence must first reasonably satisfy your minds that defendant had notice of the fact that under the circumstances J. R. Benson would suffer such mental pain if his brother Bill did not attend the funeral, and the mere sending of the message in question was not sufficient to give notice to the defendant of that fact.

"(A) I charge you that if you are reasonably satisfied from the evidence that the residence of Bill Benson on July 3, 1906, was more than one-half mile from the office of defendant in Carbon Hill, then defendant has proved its ninth plea, and your verdict must be for defendant."

(B) Same as charge 9, with reference to the tenth plea.

"(24) I charge you that there is no evidence in this case to support the averment in the complaint that plaintiff was caused to suffer great mental pain by reason of defendant's alleged breach of contract.

"(25) I charge you that the mental pain alleged by plaintiff to have been suffered by him is entirely too remote to be made a basis for damages in this case.

"(26) I charge you that you cannot award any damages to plaintiff for alleged mental pain.

"(27) I charge you that mental pain must be proven by evidence, just as any other fact in the case, before you can award damages therefor."

The following charges were given at the request of plaintiff:

"(1) I charge you, gentlemen of the jury, that although you believe that Bill Benson did not live within the free delivery limit in the town of Carbon Hill, Ala.,

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yet, if you further believe from the evidence that defendant, by the exercise of due diligence, could have delivered the telegram to him within the free delivery limit in time for him to have been present at his brother's burial, then I charge you plaintiff would be entitled to recover."

"(4) If you find from the evidence that Bill Benson had a place of business within the free delivery limits in the town of Carbon Hill, Ala., then I charge you that it would be defendant's duty to use due diligence in attempting to deliver said message to him at such place of business, and if you further believe that the failure to do so deprived Bill Benson from being at his brother's funeral, then I charge you plaintiff would be entitled to recover.

"(5) If you believe from the evidence that Bill Benson was in the town of Carbon Hill within the free delivery limits from 8 a. m., to 11:30 a. m., on the day of July 3d, and by the exercise of due diligence defendant could have delivered the telegram to him in time for him to have attended his brother's funeral, and failed to exercise due diligence, then I charge you plaintiff would have been entitled to recover."

"(10) I charge you, gentlemen, that if you believe from the evidence that the defendant's conduct in failing to deliver the message was such as to be wholly in disregard of the plaintiff's right, then I charge you that you would have a right to consider this on assessment of damages, if you find from the evidence the plaintiff is entitled to recover."

The insistence in counsel's brief with respect to charges 58, 59, 60, 71, 73, and 75, referred to in the opinion, is as follows:

"Charge 58 is a correct charge upon the effect of the evidence and cannot be disputed. Charges 59 and 60

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assert correct propositions of law and should have been given. Charge 75 is a correct statement of the measure of proof required. Charges 71 and 73 were supported by the evidence and should have been given. Plaintiff's counsel asked the witness Wakefield if he did not ask the defendant's agent, Patterson, if it was an important message, and if he did not reply that he did not know whether it was or not, and if he did not tell the agent he would deliver it, and that the agent took the message and went off with it, and if he did not tell the agent where he could find Benson. The bill of exception shows that this evidence was in rebuttal, and that the same questions had been asked the witness Patterson, defendant's agent, and that he had denied that such was the case."

CAMPBELL & JOHNSON, for appellant. The agent of the company in writing the message upon the company's blank at the request of the sender became the agent of the sender and was bound by the contract.—*W. U. Tel. Co. v. Prevatt*, 43 South. 106. The burden was on the plaintiff to show that the sendee of the message did not reside beyond the free delivery limit.—*Henderson's Case*, 89 Ala. 510. The action is ex contractu, and mental anguish is not presumed but must be shown.—*W. U. Tel. Co. v. Westmoreland*, 44 South. 382; *W. U. Tel. Co. v. Heathcote*, 43 South. 117; *Same v. Merrill*, 144 Ala. 618. Counsel discuss numerous charges but without citation of authority. As to charges 68 and 69, they cite.—*W. U. Tel. Co. v. Ayers*, 131 Ala. 391; *Same v. Luck*, 41 South. W. 469.

W. T. McELROY, J. D. ACUFF, and M. B. MCCOLLUM, for appellee. No brief came to the Reporter.

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DENSON, J.—This is an action by the sender of a telegraphic message against the defendant, Western Union Telegraph Company, to recover damages for an alleged breach of the contract on its part in not promptly delivering the message. George Benson, a man of family, who was residing about four miles from Nauvoo, in Walker county, Ala., was assassinated on the morning of July 2, 1906, while walking a foot log over the creek about a mile distant from his home. The plaintiff, his brother, was soon informed of the killing, and went immediately from his work, about 2½ miles distant, to where the remains of the deceased were lying on the bank of the creek. He then went to his deceased brother's home, and from there to Nauvoo, to notify a justice of the peace for the purpose of having an inquest held. It was late in the afternoon when the justice left Nauvoo and went to where the remains were. Plaintiff, while at Nauvoo that day, between 5 and 7 o'clock p. m., went to the defendant's telegraph office and had the defendant's operator to write out for him, on one of the company's blanks, a telegram addressed to Bill Benson, at Carbon Hill, in Walker county, Ala., about 8 miles distant from Nauvoo. Plaintiff paid the toll on the message and directed the operator to send it. The message is in this language: "Nauvoo, Ala., 7/2/1906. Bill Benson, Carbon Hill, Ala. George Benson shot and killed. Come at once. [Signed] J. R. Benson."

The complaint, among other things avers that the message was not delivered until about 3 o'clock p. m., July 3, 1906; that if it had been delivered promptly, in accordance with defendant's agreement, Bill Benson would have received same in time to attend the funeral of George Benson, and in time to aid and advise in "planning and executing said funeral." and would have aided and advised in planning said funeral. The complaint

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then concludes with the following averments: "Plaintiff avers, further, that he was damaged on account of defendant's said breach of said contract, in that he lost the consideration paid for the sending and delivery of said message, and was deprived of the aid, comfort, society, and assistance of Bill Benson while his brother George was a corpse, before burial, and in the burying of said brother George, and was caused thereby to suffer great mental pain, wherefore he sues."

The telegram was not received by Bill Benson until about 3 o'clock p. m., July 3, 1906. That was a time when and after which there was no train, due to leave Carbon Hill for Nauvoo, that would convey him to Nauvoo in time to attend the funeral and burial. The tendency of the evidence was to show that if he received the message by 1 30 p. m., he could and would have made connection by train and gone to the burial. He could not obtain a private conveyance, so he and his wife set out on foot to attend the funeral, and late in the afternoon met the family returning from the place of burial. Bill Benson then went to the home of the plaintiff and remained with him two or three days. At the house of the deceased, and attending the funeral and burial along with the plaintiff, there were five sisters and four brothers. Bill Benson, who is blind and a minister of the gospel, is the eldest of this family.

The record shows that the issues were joined on the plea of the general issue and special pleas 4 and 5; demurrers having been sustained to pleas 6, 7, 8, 9, and 10. Special pleas 4 and 5 both set up, as a defense, the usual clause of the contract in respect to the free delivery limits of the terminal office, setting it out in *hæc verba*, and aver that the sender did not pay any extra toll for delivery outside of the free delivery limits, and that defendant's agent used reasonable diligence to make the

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delivery of the message inside of the limits. The fifth plea contains the additional averments that Bill Benson lived beyond the corporate limits of Carbon Hill, and was not known by name to defendant's agent at Carbon Hill.

The principal controversy of law and of fact, so far as the mere right of recovery was concerned, arose on the issues presented by these pleas. Under the undisputed facts of the case, Shepherd, the defendant's operator at Nauvoo, at plaintiff's request, wrote out the message on one of defendant's blanks. This constituted him plaintiff's agent for writing the telegram, and bound the plaintiff by the terms of the contract.—*Western, etc., Co. v. Prevatt*, 149 Ala. 617, 43 South. 106.

In construing this free delivery clause, on contracts for the transmission of telegraphic messages, this court, through Stone, C. J., said: "When a message is handed in for transmission, the presumption must be and is that the sendee lives within the limits of free delivery, or that the sender takes the risk of delivery unless he makes arrangements for delivery at a greater distance; and handing such message, without explanation, casts no duty on the terminal employe or operator other than to copy the message correctly and deliver it with all convenient speed, if the sendee resides within the free delivery limits."—*Western, etc., Co. v. Henderson*, 89 Ala. 510, 517, 7 South. 419, 18 Am. St. Rep. 148; *Western, etc., Co. v. Merrill*, 144 Ala. 618, 39 South. 121, 113 Am. St. Rep. 66; *Western, etc., Co. v. Whitson*, 145 Ala. 426, 41 South. 405. It was also said in the *Henderson Case* "Free delivery within a half mile is not a restriction of a right, but a qualified privilege granted. It is not an inherent right; for, if it were, in the absence of restriction, it would have no limits.' It was expressly held in that case that the burden of proving the residence of

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the sendee to be within the limits was upon the plaintiff. This ruling has been recently reaffirmed in the *Whitson Case*, supra. In the case in judgment, the evidence without conflict showed that the company's established free delivery limits at Carbon Hill were embraced within the radius of a half a mile from the company's office at that place; that the sending agent had no information that the sendee resided outside of the free delivery limits (if he did so reside) of the terminal office; that if plaintiff knew it he said nothing about the fact, and paid no extra toll to secure delivery outside the limits. In this state of the proof, and in the light of the authorities cited above, it seems clear that the burden of proof on the issue as to whether the sendee resided within the free delivery limits was upon the plaintiff; and it must follow that the trial court erred in refusing written charge 19, requested by the defendant.

But it does not follow, from the premises, that charge 23, refused to the defendant, should have been given. The pleas on which the cause was tried contained the averment that reasonable diligence was exercised by defendant's agent, to make delivery of the message within the free delivery limits. It was therefore an issuable fact in the cause, and evidence was offered in support of and against it; and in this connection there was evidence tending to show that the sendee had a place of business within the free delivery limits. On these considerations notwithstanding free delivery may be "a conditional obligation on the part of the defendant, contingent upon Bill Benson's residence being within the area of free delivery," it is inapt to say that the defendant, "under the pleadings and evidence in this case," is not in default until that condition is shown.—*Walter v. Alabama, etc., Co.*, 142 Ala. 474, 482, 39 South. 87.

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For similar reasons, the court did not err in refusing charges 3 and 15, requested by the defendant.

Charge 16, refused to the defendant, was properly refused, if for no other reason, because it is misleading, in that the jury might have concluded from its language that, if the plaintiff had failed to met the burden resting upon him in respect to the residence of Bill Benson, a verdict should follow for defendant, notwithstanding they might also have believed from the evidence that defendant's agent did not exercise reasonable diligence in seeking to make delivery of the message within the free limits.

Under our decisions it cannot be questioned that the relationship of brotherhood (as shown between all the parties concerned in the message) brings this cause within the class of cases where damages are recoverable for the mental pain and anguish consequent upon failure to promptly deliver the message.—*Western, etc., co. v. Ayers*, 131 Ala. 391, 31 South. 78, 90 Am. St. Rep. 92; *Western, etc., Co. v. Crocker*, 135 Ala. 493, 33 South. 45, 59 L. R. A. 398; *Western, etc., Co. v. Haley*, 143 Ala. 593, 39 South. 386.

The message relating, as it did, to death, there accompanied it a "common-sense suggestion that it was of importance," and that the persons concerned (that is, sender and sendee) had in it a serious interest; and the surnames of sender, sendee, and person referred to in the message being the same, we do not doubt that the company was charged with notice of the relationship of the parties; and withal, the message was sufficient to reasonably apprise the defendant of the consequences of a possible failure to deliver it according to the contract, and that mental pain and anguish would probably result.—*Western, etc., Co v. Long*, 148 Ala. 202, 41 South. 965; *Cowan v. Western Union Tel. Co.*, 122 Iowa, 379,

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98 N. W. 281, 98 N. W. 281 64 L. R. A. 545, 101 Am. St. Rep. 268; *Western, etc., Co. v. Carter*, 85 Tex. 580, 22 S. W. 961, 34 Am. St. Rep. 826; *Western, etc., Co. v. Moore*, 76 Tex. 66, 12 S. W. 949, 18 Am. St. Rep. 25; *Bright v. Western, etc., Co.*, 132 N. C. 317, 43 S. E. 841; *Lyles v. Western, etc., Co.*, 77 S. C. 174, 57 S. E. 725, 12 L. R. A. (N. S.) 534; *Thurman v. Western, etc., Co.*, 105 S. W. 155, 32 Ky. Law Rep. 26, 14 L. R. A. (N. S.) 499, and cases cited in the notes to the text of the opinion. If, then, the plaintiff suffered mental pain, by reason of being deprived of the presence of Bill Benson while the brother "was a corpse, before burial, and in burying said brother," as a proximate consequence of the defendant's negligence, we are of the opinion that such mental pain is an element of recoverable damages.—*Western, etc., Co. v. Henderson*, 89 Ala. 510, 519, 7 South. 419, 18 Am. St. Rep. 148.

In arriving at such damages, the jury should not confound the mental anguish naturally arising from the loss of the deceased brother with that which is claimed to result from the defendant's negligence.—*Hancock v. Western, etc., Co.*, 137 N. C. 497, 49 S. E. 952, 69 L. R. A. 403. That the jury may have a foundation for the assessment of such damages, it is not indispensable that positive or direct evidence of mental pain be produced—such as expressions or exclamations, uttered by the plaintiff, indicative of such suffering—for the jury bring into requisition their own knowledge and experience of human nature, and applying that to the attendant facts and circumstances, estimate damages proceeding from mental anguish.—*Western, etc., Co. v. Adams*, 75 Tex. 531, 12 S. W. 857, 6 L. R. A. 844, 16 Am. St. Rep. 920; *City Nat. Bank v. Jeffries*, 73 Ala. 183, 193; *Western, etc., Co. v. Crocker*, 135 Ala. 492, 33 South. 45, 59 L. R. A. 398; *Willis v. Western, etc., Co.*, 69 S. C. 531, 48 S.

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E. 538, 104 Am. St. Rep. 828, 2 Am. & Eng. Ann. Cases, 82.

This does not conflict with the recent case of *Western, etc., Co. v. Leland*, 156 Ala. 334, 47 South. 62. The facts of that case evolve no evidence, either direct or circumstantial, of mental anguish suffered. Indeed, according to the opinion of the court, the attendant facts and circumstances were not such as to warrant the inference that the mental anguish for which damages were claimed was occasioned, or augmented, by the negligence of the defendant—the nondelivery of the message. In other words, the effect of that decision is that where a person's status or circumstances are not changed or affected, by reason of the negligence of the company in not delivering a message, the jury are not authorized to consider mental pain as an element of recoverable damages; and even where there is evidence of mental suffering, the question as to whether it existed as a basis for damages should be left to the jury.—*O'Neal v. McKinna*, 116 Ala. 607, 620, 22 South. 905.

Looking to the evidence in the case, and upon the foregoing considerations, charges 24, 25, 26, 27, 28, 37, and 38 were properly refused to defendant, each being invasive of the province of the jury.

Charge 30 is argumentative, and, besides, leaves out of consideration other phases of the case.

Charge 32 is argumentative, if not otherwise bad, and was properly refused.

Charge 33 is involved and confusing, and was properly refused.

Refused charges 34, 39, 40, and 42 are argumentative, and were properly refused.

Referring to charges 48 and 49, appellant's counsel in their brief say it has been expressly decided by this court that, "if the minds of the jury are left confused and un-

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certain, they should not find for the plaintiff." Counsel neglected to cite the case. Doubtless they had in mind *Calhoun v. Hannan*, 87 Ala. 277, 6 South. 291, as explained in the cases of *A. G. S. R. R. Co. v. Hill*, 93 Ala. 514, 9 South. 722, 30 Am. St. Rep. 65, *Brown v. Master*, 104 Ala. 451, 464, and *L. & N. R. R. Co. v. Sullivan Timber Co.*, 126 Ala. 95, 103, 27 South. 760. Without stopping to discuss those cases (*Rowe v. Baber*, 93 Ala. 422, 8 South. 865), but conceding their correctness, both of the charges in question (48 and 49) were properly refused in this instance. Charge 48 assumes that the minds of the jurors are confused and uncertain, while charge 49 is confusing and uncertain in its terms.

Charges 51 and 52 were properly refused. Charge 51 pretermits consideration of one phase of the case, and of the evidence tending to support it (that the residence of Bill Benson was within the free delivery limits). In other words, the charge assumes that his residence was outside the limits. No 52 gives undue prominence to a part of the evidence, and ignores other parts, and, besides, invades the province of the jury.

The proof shows, without conflict, that the free delivery limits fixed by the company for its Carbon Hill office were embraced in a radius of half a mile from the office, so that all persons residing within the radius are entitled to free delivery privileges; and if Bill Benson's residence was within that radius, it makes no difference that the usual route, in going from the office to his residence, covered more than half a mile. In this view, charges 53 and 54 were properly refused.

What is said by counsel in brief in respect to charges 58, 59, 60, 71, 73, and 75 fails to reach the dignity of an insistence upon the grounds of error covering them.—5 Mayf. Dig. p. 32, § 32.

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What has been said *supra* in respect to the effect of the verbiage of the message as notice to the defendant condemns charges 68, 69, and 70 in defendant's series of refused charges.

The record shows that demurrers were sustained to the ninth and tenth pleas. They were not in the case. Therefore charges A and B were properly refused to defendant. Besides, what is said of these charges is not an insistence upon the grounds of error covering them.—5 Mayf. Dig. p. 32, § 32.

All that is said by appellant's counsel in respect to the grounds of error which cover charges 1, 4, and 5, given for the plaintiff, is that they ignore the issues made by pleas 9 and 10. It suffices to repeat: The record shows that demurrers were sustained to these pleas, and that issue was not joined thereupon.

If by charge 10, given for the plaintiff, it is meant that exemplary or punitive damages might be assessed (and we fail to see that any other reasonable construction can be placed upon it), the charge asserts an erroneous principle as applied here. The action is *ex contractu*, and such damages are not recoverable.—*Western, etc., Co. v. Rowell*, 153 Ala. 295, 45 South. 73.

The court, over objection of the defendant, allowed Bill Benson to testify that he would have gone to the burial if he had gotten the telegram in the morning. The complaint avers that Bill Benson would have attended the burial if the telegram had been delivered with proper dispatch; and, it being necessary that such fact be proved, we fail to discern how it could be established otherwise than by the affirmative testimony of the person directly concerned. He was properly allowed to testify.—*Bright v. Western, etc., Co.*, 132 N. C. 326, 43 S. E. 841; *Hancock v. Western, etc., Co.*, 137 N. C. 497, 49 S. E. 952, 69 L. R. A. 403; *Western, etc., Co. v. Heathcoat*,

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149 Ala. 623, 43 South. 117. Plaintiff was also properly allowed to prove by Bill Benson that, if he had gotten the message between 8 and 9 o'clock in the morning, he could have made connection on the trains. Authorities *supra*.

The evidence showed that Bill Benson was blind, and that when he called for the telegram at defendant's office it was read to him by defendant's agent before handed to him. Under these circumstances we think it was competent, as a part of the *res gestæ* of the delivery, for this witness to testify to what the agent read to him as the telegram. Moreover, the telegram was offered in evidence, and there was no dispute as to its contents.

There is no merit in the exceptions reserved to the testimony of witness Wakefield, in regard to what occurred between him and Patterson (defendant's agent), who was seeking Bill Benson for the purpose of delivering the message. The questions asked were substantially in the language of the predicates.

While it may not be permissible for counsel to read the facts from the report of another case to the jury as a part of his argument to them (*Williams' Case*, 83 Ala. 68, 3 South. 743), it is not a breach of propriety for counsel, in presenting the law of the case to the court, to read the report of the facts of the case in connection with the opinion. This is frequently necessary, to give the court a clear understanding of the law. It may be that the court would have the right to exclude the jury from hearing while the law is being thus discussed, and this, we find, the court finally did in the instant case.

As the case must be reversed for the errors pointed out, we deem it unnecessary to discuss the objections reserved to the argument of counsel to the jury, further than to say that in some respects the argument was extreme, and that counsel should restrain themselves, so as to

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keep well within the record and leave no room for valid complaint.

We have not given seriatim consideration to the myriad grounds of error assigned. Time and energy would have failed us, had we attempted it. We have, however, considered the matters of vital importance which have been insisted upon, and feel that the opinion will be a helpful guide on another trial.

Reversed and remanded.

TYSON, C. J., and DOWDELL and SIMPSON, JJ., concur.

Birmingham Ore & Mining Co. v. Grover.

Damages for Personal Injuries From Blasting.

(Decided Feb. 4, 1909. 48 South. 682.)

1. *Trespass; Injuries From Blasting.*—The throwing of rocks or stones or other debris from blasting, upon the lands of another, constitutes a trespass.

2. *Explosives; Negligence; Burden of Proof.*—A person has a right to use explosives on his own land, and if injury occurs from such use, the burden is on the person injured to show negligence in the use.

3. *Same; Injuries From Blasting; Duty of Using Care.*—Where a person is blasting on his own land and knows, or by the exercise of reasonable diligence, could know that another person is in dangerous proximity, it becomes the duty of the person using the explosive to use means to prevent the throwing off of missiles, or to give warning when the blast is about to be fired, that those near may seek a place of safety.

4. *Same; Action; Pleading.*—In an action for damages resulting in personal injury from blasting, it is necessary to allege that the person in charge of the blasting knew, or had reason to believe, or could by reasonable diligence have known that a person injured was in a position where the missiles from the blasting would probably reach and injure him, although it was not necessary to aver actual knowledge of the proximity of such person at the time.

APPEAL from Birmingham City Court.

Heard before Hon. H. A. SHARPE.

[Birmingham Ore & Mining Co. v. Grover.]

Action by Charley Grover against the Birmingham Ore & Mining Company for personal injuries caused by blasting. There was judgment for plaintiff, and defendant appeals. Reversed and remanded.

The counts in the complaint are as follows:

“(1) Plaintiff claims of defendant \$5,000 as damages, for that heretofore, on, to wit, the 26th day of April, 1907, defendant was engaged in the operation of a certain ore mine at or near, to wit, Helen Bess, in Jefferson county, Ala., and had servants in its employment engaged in blasting in and about the operation of its said business at said mine. Plaintiff avers that on said day there was a spur track extending from the main line of the Louisville & Nashville Railroad Company to or into the said ore mine of defendant, along and over which said spur track railroad trains were operated by said Louisville & Nashville Railroad Company, for the purpose of transporting ore from said mine of defendant. Plaintiff avers that on said day he was in the employment of the said Louisville & Nashville Railroad Company as a brakeman, and while in said employment as a brakeman on one of said trains operated by said Louisville & Nashville Railroad Company, along and over said spur track, said train was propelled or run into or to said ore mine of defendant for the purpose aforesaid. Plaintiff avers that said ore was loaded upon said train by the agents of the defendant, and that on said day, while said train upon which plaintiff was a brakeman as aforesaid was at said mine, and while plaintiff was engaged in coupling the cars of said train, one or more of the employes or agents of the defendant, who were at the time engaged in working on top of the cut over said place where plaintiff was engaged as aforesaid, made a blast or fired a shot, and a rock or other hard substance was hurled or thrown by said blast or explosion, striking plaintiff on the head

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with great force and violence, knocking him down, and rendering him unconscious, whereby, and as a proximate consequence whereof, plaintiff was rendered sore and sick, and was painfully injured, was for a long time rendered wholly unable to work and earn money, was rendered permanently disabled to work and earn money, was put to great expense for medicine, medical care, and treatment in and about his efforts to heal and cure himself, and suffered great mental and physical pain. Plaintiff avers that said servant or servants of defendant were at said time acting within the line and scope of their employment, and that said shot or blast was fired without notice or warning being given to the plaintiff. Plaintiff further avers that he suffered said injury and sustained said damages by reason and as a proximate consequence of the negligence of defendant in suffering or allowing said blast or shot to be made or fired at a time when plaintiff was engaged as aforesaid at said place, without sufficient notice or warning being given as aforesaid. Hence this suit.

“(2) Plaintiff claims of the defendant \$5,000 as damages, for that heretofore, to wit, on the 26th day of April, 1907, defendant was engaged in the operation of a certain ore mine in Jefferson county, Ala., and on said day plaintiff, who was at said time in the employment of the Louisville & Nashville Railroad Company as a brakeman, was by consent or invitation of the defendant upon the premises where said ore mine was being operated by defendant as aforesaid. Plaintiff avers that, while upon said premises as aforesaid, a certain blast or explosion or shot was made or fired by some person engaged in and about getting out ore for the defendant at its said mine, and a certain rock, missile, or hard substance was by said blast, explosion, or shot hurled with great force and violence, striking plaintiff upon the head, fracturing his

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skull, and inflicting serious and painful injuries, whereby plaintiff was rendered sore and sick. [Here follows catalogue of injuries as stated in count 1.]”

Demurrers were interposed to count 1 as follows: “(1) It shows no breach of duty owing by defendant to plaintiff. (2) It is vague, indefinite, and uncertain. (3) The facts set forth therein, which are averred to constitute negligence upon the part of defendant are insufficient to show such negligence. (4) It is not shown by said count that defendant, or its servants or employees acting within the line or scope of their employment, where chargeable with notice that plaintiff was in danger of being struck by a rock from the blast alleged to have been set off. (5) The facts set forth in said count are insufficient to charge defendant with the duty of warning plaintiff that a blast was about to be fired.” The same grounds were assigned to the second count, with the following additional ground: “The facts set forth in said count are insufficient to show that the blast alleged to have been the cause of plaintiff’s injury was fired at an improper time or without sufficient warning.”

PERCY & BENNERS, for appellant. The complaint is construed most strongly against the pleader.—*Woodward I. Co. v. Cook*, 124 Ala. 349. The complaint was subject to the demurrers interposed.—*H. A. & B. R. R. Co. v. South.*, 112 Ala. 642; *Decatur C. W. & M. Co. v. Meahaffey*, 128 Ala. 242; *Reiter-Connolly Mfg. Co. v. Hamlin*, 144 Ala. 192; *C. E. Co. v. Pryor*, 32 South. 797; 6 Thomp. on Neg. sec. 7453.

STALLINGS & DRENNEN, for appellee. The 1st and 2nd counts are not subject to the demurrers interposed.—*Bessemer C. I. & R. R. Co. v. Doak*, 44 South. 627; *Hayes v. Cohoes Co.*, 51 Am. Dec. 279; *Central I. & C. Co. v.*

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Vandeheurk, 47 South. 145; *Culberson v. Empire Coal Co.*, 47 South. 237; 19 Cyc. pp. 710; 97 Am. Dec. 761; 53 Am. St. Rep. 584; 45 Am. Rep. 30.

SIMPSON, J.—This suit is by the appellee against the appellant for injuries received from the blasting operations of defendant while the plaintiff was engaged in his employment as a brakeman of the Louisville & Nashville Railroad Company. The first assignment of error insisted on is to the overruling of the demurrer interposed by the defendant to the first count of the complaint. It is urged that, although very general averments of negligence are sufficient, yet, when the pleader undertakes to state facts which are supposed to constitute the negligence, he is limited to the facts set forth, and that the facts set forth in this complaint do not justify the charge of negligence. In the use of explosives it is recognized that if one, in blasting, throws stones, rocks, or other substances on the land of another, it constitutes a trespass.—*Bessemer Coal, etc., Co. v. Doak*, 151 Ala. 670, 44 South. 631. It is also recognized that a person has the right to use explosives on his own lands with certain precautions, and when an injury occurs thereon the burden is on the plaintiff to show negligence in the use of the explosives.

We understand, from the allegations of this count, that the plaintiff was on the land of the defendant when the injury was received. If a party who is blasting on his own land knows, or has reason to believe, or could by reasonable diligence know, that any one is in dangerous proximity to the place where the blasting is being done, it is the duty of the person in charge of the explosive either to use means to cover the place, so as to prevent the throwing off of material, or to give warning when the blast is about to be made, in order that those in perilous places may seek a place of safety.—*Cameron et al. v.*

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Vandergriff, 53 Ark. 381, 386, 13 S. W. 1092; *Blackwell v. Moorman & Co.*, 111 N. C. 151, 16 S. E. 12, 17 L. R. A. 729, 729, 732, 32 Am. St. Rep. 786, and note; *Blackwell v. Lynchburg & D. R. R.*, 111 N. C. 151, 16 S. E. 12, 17 L. R. A. 729, 32 Am. St. Rep. 786, 791; *Wright v. Compton*, 53 Ind. 337, 341; *Driscoll v. Newark, etc., Co.*, 37 N. Y. 637, 97 Am. Dec. 761, 763; *Gates v. Latta*, 117 N. C. 189, 23 S. E. 173, 53 Am. St. Rep. 584. "The sufficiency of a complaint, in an action for personal injuries, which undertakes to define the particular negligence which caused the injury, must be tested by the special allegation in that respect, although the general allegation of negligence would, in the absence of such special allegations, be sufficient to make a prima facie case of negligence."—6 Thompson on Negligence, § 7452; *Consumers' Elec., etc., Co. v. Pryor*, 44 Fla. 354, 32 South. 797, 805; *Decatur, etc., Co. v. Mehaffey, Adm'r*, 128 Ala. 242, 253-4, 29 South. 646; *Highland, etc., Co. v. South*, 112 Ala. 642, 650, 20 South. 1003.

While, according to the authorities cited, it is not necessary to aver that the party doing the blasting had actual knowledge of the proximity of the person injured, yet it is necessary to allege that he either knew, or had reason to believe, or could by reasonable diligence have known, that the party injured was in a position where the missiles from the blasting would probably reach and injure him. In this particular said count was demurrable. Consequently the court erred in overruling the demurrer to said first count.

For the same reason the court erred in overruling the demurrer to the second count.

The judgment of the court is reversed, and the cause remanded.

Reversed and remanded.

DOWDELL, ANDERSON, and MAYFIELD, JJ., concur.

[Richards v. Burgin.]

Richards v. Burgin.*Action Against Sheriff for Killing Plaintiff's Intestate.*

(Decided April 15, 1909. 49 South. 294.)

1. *Death; Action; Pleading; Defenses.*—As a defense to an action against an officer for killing a person whom he was attempting to arrest, a plea setting up that at the time mentioned in the complaint the defendant was sheriff of a certain county, that a warrant for the arrest of plaintiff's intestate had been placed in his hands, that while two of his deputies were undertaking to arrest intestate, he undertook to escape, and while fleeing from said deputies was shot and killed by one of them, and that the shooting reasonably appeared to be necessary to prevent the escape of intestate, is insufficient as a plea of justification, as it does not aver that the officer gave information to the intestate of his authority, nor does it set out such fact as exempted the officer from giving such information and does not show that the intestate could not have been taken by other means.

2. *Same; Arrest; Right to Kill.*—If in the lawful pursuit of a person charged with felony, an officer may kill such person if necessary to prevent his escape.

3. *Same; Jury Question.*—The question of the necessity of killing a person is one to be determined by the jury where the action is against an officer for causing the death of a person whom he is attempting to arrest.

APPEAL from Birmingham City Court.

Heard before Hon. H. A. SHARPE.

Action by G. S. Richards administratrix of the estate of G. W. Hill, deceased, against Andrew W. Burgin as sheriff for damages for causing the death of deceased while attempting to arrest him. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

J. W. CHAMBLEE, and ROSCOE CHAMBLEE, for appellant. Plea 13 was patently bad, and the court erred in overruling demurrers to it.—Sec. 5210, Code 1896; *Brown v. The State*, 109 Ala. 70; *Drennan v. People*, 10 Mich. 169; 2 A. & E. Ency of Law, 848; *Williams v. The State*, 44 Ala. 41; 2 Bish. Crim. Law, secs. 647-8; 1 East.

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P. C. 298; *Jackson v. The State*, 66 Miss. 89; *Carr v. The State*, 43 Ark. 99; *York v. Commonwealth*, 82 Ky. 360.

TILLMAN, GRUBB, BRADLEY & MORROW, and M. M. BALDWIN, for appellee. The court properly overruled the demurrers to plea 13.—*Brown v. The State*, 109 Ala. 70; *State v. Taylor*, 70 Vt. 1; *King v. The State*, 89 Ala. 43. The duty was on the deceased to permit the arrest.—18 S. W. 1018; 33 S. W. 1066; 44 Pac. 411; 1 Hill. 327; *Rex v. Finucane*, 1 C. & B. 1; *Jackson v. The State*, 14 Am. St. Rep. 542. If the accused prevents the officer from giving the information, the officer need not inform the accused of his purpose.—*State v. Gay*, 18 Mont. 51; *People v. Carlton*, 115 N. Y. 623. For further authorities upon the proposition that the officer need not inform the accused of his purpose in making an arrest, if such purpose is known to the accused, or if he prevents the officer from giving such information, see the following cases.—*People v. Nash*, 1 Idaho, 206; *Wolf v. State*, 19 Ohio St. 248; *People v. Pool*, 27 Cal. 572; *Rex v. Whitehorne*, 3 Car. & P. 394; *Shovlin v. Com.*, 106 Pa. 369; *Rex v. Payne*, 1 Moody, C. C. 378; *Rex v. Howarth*, 1 Moody C. C. 207; *King v. State*, 89 Ala. 45; *Com. v. Weathers*, 7 Kulp, 1; *Tiner v. State*, 44 Tex. 128; *Plasters v. State*, 1 Tex. App. 673; *People v. Durfee*, 62 Mich. 487; *United States, Roberts v. Fayette County Jailor*, 2 Abb. (U. S.) 65; *Rex v. Davis*, 7 Car. & P. 785; *Com. v. Field*, 13 Mass. 321; *State v. Anderson*, 1 Hill, L. 328; *Keady v. People* (Col.) 66 L. R. A. 353, 370 and extended note.

DENSON, J.—This action is by the administratrix of the estate of G. W. Hill, deceased, against Andrew W. Burgin, for the recovery of \$30,000 damages for the alleged wrongful killing of said Hill. The action is predi-

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cated upon section 27 of the Code of 1896 (section 2486 of of the Code of 1907).

The seventh count of the complaint, the one on which the trial was had, is in this language: "The plaintiff, as the administratrix of the estate of G. W. Hill, deceased, claims of the defendant the sum of \$30,000 as damages, for that heretofore, on, to wit, the 13th day of June, 1905, the defendant was sheriff of Jefferson county, Alabama, and A. J. Gaddis and J. N. Curl were deputy sheriffs under, and agents of, the defendant, and that said A. J. Gaddis and J. N. Curl, while acting within the scope of their official employment as agents and deputy sheriffs of the defendant as aforesaid, did wrongfully cause the death of the plaintiff's intestate, the said G. W. Hill, by wrongfully shooting him with a gun or pistol in Jefferson county, Ala."

Plea 13 to the complaint is in this language: "Defendant, for further answer to the complaint, says that the defendant was, at the time mentioned in said complaint, sheriff of Jefferson county, Ala.; that previous to the time mentioned in said complaint there had been delivered to him for execution a certain warrant of arrest, issued by W. D. Paris, as coroner of Jefferson county, and who was at the time of the issuance thereof the coroner of Jefferson county, which said warrant of arrest commanded the sheriff of Jefferson county to arrest plaintiff's intestate on the charge of murder. And defendant avers that at the time mentioned two of his deputies, being duly authorized by the defendant, undertook to arrest the said plaintiff's intestate; that said intestate undertook to escape from said arrest, and while fleeing from said deputies was shot and killed by one of said deputies. And defendant avers that the shooting of said intestate by one of said deputies reasonably appeared to be necessary in order to prevent the escape of plaintiff's intestate."

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There was verdict and judgment for the defendant, on issue joined on plea 13, and the plaintiff has appealed. She here assigns for error the action of the trial court in overruling her demurrer to plea 13.

The demurrer and the appellant's argument in support of it proceed upon the theory that, to render the plea safe from demurrer, it should have been therein alleged that the deputies informed plaintiff's intestate of their authority as officers to arrest him; and, secondly, that it should have alleged that plaintiff's intestate could not have been overtaken otherwise than by resort to the extreme measure of shooting him. Section 5210 of the Code of 1896 (section 6268 of the Code of 1907) provides that: "An officer may execute a warrant of arrest on any day and at any time. He must, in doing so, inform the defendant of his authority, and, if required, must show the warrant," etc.

It is this statute that the appellant takes as a basis for her first contention, invoking *Brown's Case*, 109 Ala. 70, 91, 20 South. 103, as authority in support of her theory and contention. In that instance the defendant was tried for and convicted of the crime of murder—the killing of a person who had been summoned by a special constable to aid him in arresting the defendant under a warrant for a misdemeanor. The killing occurred in the night, and while the arresting party was entering the house where the defendant was. One phase of the evidence tended to show that there was no notification to the defendant that a warrant had been issued for his arrest, and that the party had it present for exhibition, if required. Judge Brickell, for the court, after quoting the statute here involved, said: "The requirements of the statute are drawn from and in affirmation of the common law. They are ample to secure the execution of and submission to legal process; but they are equally intended to protect the citizen from unlawful inter-

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ference with his personal liberty. It is not intended that he shall yield his person and liberty to the dominion of even a known public officer, certainly not to one unknown, upon his mere demand, who gives no information of his authority. If this were not true, no man would be safe from invasions of his personal liberty, and unlawful arrests would be made effectual."

In the light of this decision, and of other authorities, we have no hesitancy in holding that a plea of justification, under a warrant, fails to show a compliance with the statute in question, and is insufficient, unless it avers in terms that the officer gave information to the defendant of his authority, or avers such a state of facts as exempted him from imparting such information. If the attending circumstances were such as rendered the giving of the information, or the attempt to give it, unavailing or unreasonable, the plea should set out such circumstances in a succinct form, that the court may determine, as matter of law, their sufficiency vel non as an exemption from the discharge of the duty imposed by the statute. So far as the averments of the plea in judgment go, they are perfectly consistent with the idea that the deputies had ample opportunity to impart to the defendant in the warrant the information required by the statute, even before he attempted to flee, and that they made no effort to do so. Moreover, we do not feel warranted by the law in saying, upon the averments of the plea, that an effort to give the information would have been futile. So, according to a well-established rule for construing pleadings, it must be held that the court below committed reversible error in not sustaining, on the point we have discussed, the demurrer to the plea.

In respect to the second proposition of the demurrer, it is undoubtedly true that an officer, in lawful pursuit of a felon, is allowed to kill, if to do so is necessary to prevent his escape by fight.—1 East's C.

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L. 300; 4 Black. Co. 180; 2 Bishop on Cr. Law, § 648; S Cyc. 891; 2 Am. & Eng. Ency. Law, 848, *Story's Case*, 71 Ala. 329; *Williams' Case*, 44 Ala. 41; *Phillips' Case*, 119 Iowa, 652, 94 N. W. 229, 67 L. R. A. 292; *Brown v. Weaver*, 76 Miss. 7, 23 South. 388, 42 L. R. A. 423, 71 Am. St. Rep. 512; *United States v. Clark* (C. C.) 31 Fed. 710. This principle is conceded by the appellant in her brief; but the point of the demurrer in this respect is that the plea fails to show that Hill could not have been taken by other means than shooting him—such as pursuit, the obtaining of assistance, etc. The averments of the plea, on this point, are that Hill was fleeing from the deputies, and was shot and killed, and that the “shooting of said intestate * * * reasonably appeared to be necessary in order to prevent the escape of plaintiff's intestate.” The conclusion of the plea, that it was reasonably necessary to shoot, has for its basis the single averred fact that the felon was in flight. That may have been true, and it may also have been true that the officers made no effort whatever to overtake the defendant by pursuit. That they did not make such effort is the meaning of the plea, according to the rule that it must be construed most strongly against the pleader. Indeed, no excuse is presented by the plea for not attempting to run the defendant down. The deputies resorted to extreme measure; but it is a salutary principle of law, and one in keeping with humanity, that, to afford warrant for resort to such measures, the attendant circumstances must be such as would justify a jury in the conclusion that they were necessary in order to prevent the felon from escaping—not that such measures were only reasonably necessary. This is in harmony and line with the ruling made in the well-considered case of *United State v. Clark, supra*. See, also, *Jackson's Case*, 66 Miss. 95, 5 South. 690, 14 Am. St. Rep. 542; *Brown v. Weaver, supra*; *Williams' Case, supra*.

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To make the plea safe from attack by demurrer, in the phase now under consideration, the facts or circumstances just preceding and attending the flight, and what was done by the officers and by Hill, should be set out, so that the court may say or determine whether, on the face of the plea, the circumstances were sufficient to require the submission to the jury of the question of the necessity of the shooting to prevent escape. Certainly so important an issue should not be presented merely by the conclusion of the pleader, as was done in the plea in judgment. To hold this plea sufficient would be the equivalent of holding that the officer might be the arbitrary judge as to whether the necessity existed for taking Hill's life—a question obviously for the ultimate determination of the jury under proper instructions from the court. *State v. Bland*, 97 N. C. 438, 2 S. E. 460; *State v. Smith*, 127 Iowa, 534, 103 N. W. 944, 70 L. R. A. 246, 109 Am. St. Rep. 402. The case of *Patterson v. State*, 91 Ala. 58, 8 South. 756, properly interpreted, is not in conflict with the views here expressed. The court had under consideration a case of assault and battery committed by a police officer, after gaining custody of his prisoner, to prevent him from doing violence to another; and it was in reference to the facts that the court spoke and not to the sufficiency of the pleadings to put the facts before the jury.

We are constrained to hold that the plea is subject to the points made against it by demurrer, and that the court erred in overruling the demurrer. The judgment of the city court will be reversed, and the cause remanded.

Reversed and remanded.

DOWDELL, C. J., and SIMPSON and MAYFIELD, JJ., concur.

[Cohn & Goldberg Lbr. Co. v. Robbins.]

Cohn & Goldberg Lbr. Co. v. Robbins.

Damages for Injury to Buggy.

(Decided Feb. 18, 1909. 48 South. 853.)

1. *Evidence; Declaration of Persons in Possession; Admissibility.* The object of the declaration being solely for the purpose of proving that the property which injured the buggy belonged to the defendant, and no notice of such declaration having been given to defendant, the declaration of the driver of the team made after the accident as to the ownership of the team, was not admissible.

2. *Same; Relevancy; Res Gestae.*—A declaration made while in the actual possession and control of personal property, and explanatory of such possession, was admissible as part of the *res gestae* of such possession.

3. *Same; Opinion Evidence; Mental State.*—A witness not being competent to testify as to a particular person's mental status, his testimony that a woman who was driving the horse was so anxious that she got the impression on her part that she was in danger, is not admissible, in an action for injury occurring in a collision between an ox team and wagon and a horse and buggy.

4. *Same; Expert Testimony.*—Where there was evidence that the driver of an ox team was an experienced ox driver and as to how he was managing the team at the time of the accident, it was competent for such driver to give his opinion as to whether the team was driven at the time in a proper manner.

5. *Same; Admission by Agent; Time of Making.*—A declaration made by an agent while conducting a transaction within the scope of the agency is admissible for the purpose of throwing light upon the transaction itself.

6. *Highways; Use for Travel; Instruction.*—A charge asserting that if the jury believed that immediately prior to or at the time of the collision the driver of the oxen did all that a prudent and careful driver could have done, to prevent the collision, they could not find for the plaintiff, would justify a finding for the defendant, although the driver might have done nothing immediately prior to the collision to prevent it, and its refusal was proper.

7. *Same.*—A charge asserting that if the jury believe that defendant's driver was a prudent driver of steers, and that he used every means in his power to prevent a collision, they must find for the defendant, is improper since the driver might have been a prudent driver and yet not competent to manage a team of the character of one in possession.

8. *Same.*—A charge asserting that if, at the time of the accident, the oxen became suddenly frightened, and the driver did all that a skillful and prudent driver could have done under the circumstances

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to prevent the accident, the jury should find for the defendant, and if they believe that the injury was occasioned by the sudden fright on the part of the oxen and that the driver did all that a reasonably prudent and careful driver could do to prevent the accident, they should find for the defendant, pretermits the absence of fault on the part of the driver in the sudden frightening of the oxen.

9. *Same*.—A charge asserting that if the driver of the oxen did all that was possible to be done at the time of the accident to prevent the same, and he was a competent driver, the jury could not find for the plaintiff, limits the preventive effort to the time of the accident and was properly refused.

10. *Same*.—Where the action was against the C. & G. Lbr. Co., and the evidence tended to show that the oxen and wagon doing the damage was the property of the C. & G. Lbr. Co., a charge asserting that unless the jury believed from the evidence that the oxen were the property of the C. & G. at the time of the accident, they must find for the defendant, is properly refused.

11. *Charge of Court; Argumentative*.—A charge asserting that public bridges are for the use of oxen and drays as much as for horses and buggies, was properly refused as argumentative.

12. *Trial; Objection to Evidence; Time for*.—An objection to a question not made until after the witness answers the question comes too late, notwithstanding the court declared the evidence proper at the time he overruled the objection.

13. *Principal and Agent; Proof of Agency; Declaration of Agent*.—The fact of agency cannot be proven by the declarations of the agent.

APPEAL from Elmore Circuit Court.

Heard before Hon. W. W. PEARSON.

Action by W. O. Robbins, Jr., against the Cohn & Goldberg Lumber Company. Judgment for plaintiff, and defendant appeals. Reversed and demanded.

The cause of action is based upon the injury done to the horse and buggy of plaintiff by being run into by a team of oxen and wagon belonging to the defendant and at the time under the control and management of one L. F. Hood, a servant of the defendant. While Robbins was being examined as a witness, and had testified that Mrs. Lancaster was in the buggy and was driving, meeting the team of oxen, he was asked by his counsel: "Did you hear Mrs. Lancaster say anything?" Objection being overruled to this question, the plaintiff put it in the following form: "Now, then, did you hear Mrs.

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Lancaster say anything to the driver?" And the witness answered: "I could see that Mrs. Lancaster was anxious." And counsel asked the witness the following question: "So anxious that she got the impression on her part that she was in danger?" And the witness answered: "Yes, sir." Then the bill of exceptions shows that the defendant objected to the question and answer because it called for irrelevant testimony, and because the evidence sought was hearsay, and the court remarked: "I don't think so, and I overrule the objections." L. F. Hood was called as a witness for plaintiff, and testified that after the accident he called Mr. Robbins, and "he asked me whose team it was," and plaintiff's attorney then asked the witness: "Whose property did you tell him it was?" Objection was interposed and overruled, and the witness answered: "I told him it was Mr. Goldberg's and Mr. Cohn's, and Mr. Norris', I suppose." This is the evidence referred to in the opinion.

The following charges were requested by, and refused to, the defendant:

"(2) If you believe from the evidence that L. F. Hood was the agent of the Cohn & Goldberg Lumber Company, and that the team of steers which collided with the horse and buggy of Robbins belonged to the Cohn & Goldberg Lumber Company, and that, immediately prior to or at the time of the collision between said team and the buggy of said Robbins, said Hood did all that a prudent and careful driver could have done to prevent a collision, then you cannot find for the plaintiff in this case.

"(3) If you believe from the evidence in this case that L. F. Hood, the driver of said team, was a prudent driver of steers, and that he used every means in his power to prevent a collision between the dray and the steers in his charge and the buggy and horse in the charge of W. O. Robbins, Jr., then you must find for the defendant.

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“(4) If you believe from the evidence in this case that the said steers and wagon were under the control of an ordinarily skillful and prudent driver, no matter whether said driver was in the employ of the Cohn & Goldberg Lumber Company or J. E. Wamble, and that at the time of the accident the steers became suddenly frightened, and that the driver did all that a skillful and prudent driver of steers could have done under the circumstances to prevent the accident, then you cannot find a verdict for the plaintiff in this case.

“(5) If you believe from the evidence in this case that the injury to the horse and buggy of W. O. Robbins, caused by the steers and team colliding with same, was occasioned by a sudden fright on the part of the steers, and that the driver in charge of the same did all that a reasonably prudent and careful driver could do to prevent the accident, then plaintiff cannot recover in this case.

“(6) If you believe that L. F. Hood, who, it is shown by the undisputed evidence, was in charge of the steers and wagon causing the injury to the plaintiff, did all that was possible to be done at the time of the accident to prevent the same, and that he was an ordinarily prudent and careful driver of steers, and accustomed to drive same, then you cannot find for the plaintiff in this case.

“(7) The court charges the jury that, unless they believe that the steers were the property of Cohn & Goldberg at the time of the accident or damage complained of, then you must find for the defendant.”

“(12) Public bridges are for the use of steers and drays, as much as for horses and buggies.”

FRANK W. LULL, and GUNTER & GUNTER, for appellant. Counsel discuss the questions presented by the assignment of error, but without citation of authority.

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PHARES COLEMAN, and HOLLY & McMORRIS, for appellee. Counsel discuss the questions presented by the assignment of errors, but without citation of authority.

DOWDELL, C. J.—The general rule is that the declaration of one made while in the actual possession and control of personal property, and explanatory thereof, is admissible in evidence, and this upon the idea that it is a part of the *res gestæ* of such possession.—Mayfield's Digest, vol. 3, p. 453, § 355. We think, however, when, as in the present case, the person whose declaration is sought to be proven is himself the witness testifying, and not being sought for purpose of impeachment, such evidence would be of little probative force, since the sworn testimony of the witness as to the facts would be better evidence than his unsworn declaration. The majority of the court are of the opinion, and so hold, that under the facts of this case the declaration of Hood, admitted in evidence, as to the ownership of the team, made by him while in the possession and control of the same as a driver, does not come within the principle above stated as to declarations, made by one in possession of property, explanatory of such possession, and that in the admission of this evidence the court committed reversible error. The writer, with whom McCLELLAN, J., concurs on this point, is of the opinion that if the declaration of one in possession, explanatory of such possession, be admissible in evidence upon the theory of *res gestæ* of the possession, which seems to be the universal rule, such declaration explanatory of possession would not be rendered incompetent because it might tend to show ownership of the property in a third party.

The plaintiff was permitted to prove by his witness Robbins, against the objection of the defendant, that a

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Mrs. Lancaster, whom witness passed in a buggy on the bridge just preceding the collision between the ox team and the plaintiff's buggy, "was so anxious that she got the impression on her part that she was in danger." In the admission of this evidence against the defendant's objection the court was in error. The anxiety of Mrs. Lancaster was wholly irrelevant and immaterial, and, besides, the witness was not competent to testify as to the mental status of Mrs. Lancaster. The majority of the court, however, are of the opinion that, since it appears from the bill of exceptions that the objection was not made to the question until after the witness answered, the objection came too late, and that the action of the court in overruling the objection and admitting the evidence should not, for this reason, be revised, notwithstanding the court, in overruling the objection, expressed the opinion that the evidence was competent. The writer of the opinion thinks that, since the court evidently based its ruling upon the competency of the evidence, and not upon the ground that the objection came too late, which latter ground is one addressed to the discretion of the court, the question is one proper for revision by this court.

There was evidence tending to show that the driver of the ox team was an experienced driver, and also evidence showing how he was managing the team at the time of the accident. On this evidence it was competent for the witness Norris, who was shown to be an experienced and expert driver of ox teams, to give his opinion as to whether the manner in which the team was driven was proper.

Charge 2, requested by the defendant, was rendered bad in the use of the disjunctive conjunction "or," and for this reason, if no other, was properly refused. By this charge the jury were instructed to find for the de-

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fendant, although the driver of the ox team might have done nothing "immediately prior" to the collision to prevent the same.

The third charge asked by the defendant is subject to the criticism that it pretermits the competency of the driver of the ox team. He might have been a prudent driver, and yet not competent to manage a team of the character of the one in question, and, if not, the defendant would be liable for an injury done another caused by the incompetency of the driver.

The fourth and fifth charges are each faulty in pretermittin an absence of fault on the part of the driver in the "sudden fright" of the oxen, and for this reason, if no other, these charges were properly refused.

The sixth charge limits all preventive efforts to avoid the injury to the time of the accident, when it might have been avoided by taking precautionary measures before the time of the accident.

There was no evidence that the team was the property of Cohn & Goldberg, but the property of Cohn & Goldberg Lumber Company, and hence charge 7 was properly refused.

The twelfth charge requested by defendant was argumentative, and there was no error in refusing it.

In accordance with the holding of the majority of the court, for the error committed in the admission of the evidence of the witness Hood, indicated above, the judgment must be reversed, and the cause remanded.

Reversed and remanded.

SIMPSON, J.—In behalf of the majority of the court, holding that the witness Hood should not have been allowed to testify that he had said, shortly after the accident, that the wagon and team belonged to the defendants, I desire to say: First. That the remark was not

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made at the time of the accident, but after the witness and the team had crossed the bridge and proceeded into the town of Wetumpka.—*Williams v. State*, 130 Ala. 109, 117, 30 South. 484. Second. The object of this testimony was not to explain his possession, nor was it sought as a part of the *res gestæ* to explain the accident, but for the purpose of proving that the property belonged to the defendant. It may also be said, upon the general proposition referred to by our Brother who writes the opinion, that the rules of evidence must be construed as an entire body of laws, and that the fact that, under certain circumstances, given testimony is admissible, does not mean that it should be admitted when its purpose and effect is to override other fundamental principles of law. The fact that, under certain circumstances and conditions, the declarations of a party in possession may be admitted, to explain his possession, and that matters which are a part of the *res gestæ* may be admitted do not mean that such testimony is admissible against a third party, when it is a violation of the fundamental principles in regard to hearsay testimony to admit it.

It is a settled principle in the law of agency that, while the declarations of an agent who is admitted or proved to be such, may be admitted, if made in conducting a transaction within the scope of his agency, for the purpose of throwing light upon the transaction itself, it is equally true that the fact of agency cannot be proved by the declarations of the agent.—1 Elliott on Ev. § 252; 2 Elliott on Ex. §§ 1631 (note 21), 1636; *Whiting & Co. v. Lake*, 91 Pa. 349; *First Nat. Bank of Tuscaloosa v. Leland*, 122 Ala. 289, 295, 296, 25 South. 195; *Owensboro Wagon Co. v. Bliss et al.*, 132 Ala. 254, 260, 31 South. 81, 90 Am. St. Rep. 907; *Mobile & Montgomery R. v. Ashcraft*, 48 Ala. 15, 30. While the acts and declara-

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tions of one in possession are admissible to explain his possession, yet they are not admissible to prove ownership of or with another, unless notice thereof is brought home to the other.—*Central, etc., Co. v. Smith*, 76 Ala. 572, 578, 579, 52 Am. Rep. 353; *Humes v. O'Bryan & Washington*, 74 Ala. 64, 78180. In the case just cited, the court held that the declarations of the partner were admissible, if at all, only because made against his interest, and because he "possessed competent knowledge of the facts, and is deceased at the time the declarations are proposed to be proved," but that even then "they cannot be said to be evidence against the defendant, Humes, of the existence of the partnership in question, unless some notice of them was brought to his knowledge." It is true, as intimated in that and in other cases, that where a partnership is sought to be proved by circumstantial acts, among which are continuous transactions by the partners, there may be cases where the declarations of one, acting continuously and openly in the partnership name, may be admissible as a circumstance, but that does not militate against the general principle.

In the case now before the court, the witness whose declarations were sought to be introduced was on the stand; and even if he possessed any competent knowledge of the ownership, it should have been proved by his testimony under oath, and not by his stating what he had said before. The cases in which expressions have been used which, taken from their context, may seem to be in conflict with the foregoing cases, are easily explainable on other principles. For instance, the case of *Daffron v. Crump*, 69 Ala. 77, was a trial of the right of property in a yoke of oxen which had been levied on as the property of said Daffron; and a claim was interposed by his wife, setting up that the property was hers. There was no question about the fact that said defend-

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ant, Daffron, had bought the oxen and paid for them; the question to be solved being whether he bought them for himself or for his wife. Whether Daffron had paid for the oxen with his own money, or with that of his wife, was a matter not made clear by the evidence. Hence it became a matter to be proved, by circumstances, whether he was claiming them as his own or as the property of his wife. The case was reversed on another point, to wit, that a party who knows can testify as to the ownership of personal property (in such a case, which involved no question of the construction of a contract); and the court went on to make some remarks, for the guidance of the court below in trying the case again, to the effect that "in trials of the right of property, declarations or admissions by the defendant in execution, made in the absence of the claimant, are, as a rule, not admissible. They come under the class of *hearsay* evidence. But parties in possession of *such property may* make declarations explanatory of their possession, and either claim or disclaim ownership of the property, and such declarations may be given in evidence, in an issue of disputed ownership, no matter who be the parties to the suit." (Italics ours.) In other words, in this particular class of cases, there may be such a state of circumstances that it becomes necessary to prove, as circumstance, whether the husband is claiming the property as his own or as his wife's, in order to determine what his intentions were in buying it. In the case of *Kirkland v. Trott*, 66 Ala., 417, Kirkland disclaimed possession in an action of ejectment, and the declarations of one Hogan, who was in possession, to the effect that he had taken possession for Kirkland, were admitted; but it was proved "that Hogan had been defendant's agent or clerk before that time, or had been in business with him," and also that a written demand had been made

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on Kirkland for possession, and that he had refused to deliver possession, saying nothing about Hogan's being in possession. In the case of *Brazier & Co. v. Burt*, 18 Ala., 201, the plaintiffs had levied on certain cotton as the property of John M. Mack, and the declarations admitted were really directions by Mack to his son to have the cotton ginned and packed and delivered to the claimant, and this evidence was to show that the conveyance was not simulated, but that Mack had in fact delivered it to the claimant, in accordance with the contract. It would be too tedious to notice particularly all the cases on this subject, but those discussed are probably the strongest that can be cited having any tendency to show the admissibility of this evidence.

Another fact may be noticed towit, that in all the cases where this testimony was admitted the point at issue was whether the party making the declaration was claiming the property himself, or, disclaiming any ownership, acknowledged that he held for another. In none of them was a party, who was acknowledged by both parties to have interest in the property, allowed, by his mere declarations, to show that the title to the property was in either one or the other, simply because he had been employed to transport it from one point to another. The fact is that a servant is not in the possession of personal property intrusted to him, but that his possession is the possession of his master. "A servant's declarations regarding the rights or liabilities of the master are incompetent, in the absence of some proof of express agency and evidence that the statements were within the line of the declarant's duty and made while he was in good faith seeking to discharge it."—16 Cyc. 1030. It is inconceivable that any court should declare that a mere servant, employed to drive a team, could, by his mere

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declarations as to the ownership of the team, fix a liability on the master, and that, too, when the servant is present, and can be examined under oath, and made to show whether he knows anything about it.

ANDERSON, DENSON. and MAYFIELD, JJ., concur in the views of Justice SIMPSON. McCLELLAN, J., is of the opinion that there is no error in the record, and hence that an affirmance should be entered.

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Trespass for Cutting Timber.

(Decided Jan. 18, 1909. Rehearing denied Feb. 16, 1909.
48 South. 697.)

1. *Trial; Reception of Evidence; General Objection.*—Unless the evidence is manifestly illegal and irrelevant, and apparently incapable of being rendered admissible in connection with other evidence, an objection thereto that it is illegal, irrelevant and incompetent, is a general objection and cannot be sustained.

2. *Same; Best and Secondary Evidence.*—Secondary evidence otherwise admissible except for the fact that primary evidence was accessible, is not open to the objection that the question calling for was incompetent, illegal and immaterial.

3. *Appeal and Error; Objections in Lower Court.*—The overruling of specific objections to evidence which does not cover the defect in the evidence is not grounds for a reversal.

4. *Evidence; Opinion Evidence; Estimates.*—Where a witness has looked over the ground from which timber had been sawed, such witness was competent to give his best judgment as to the number of trees cut, although he did not count the stumps.

5. *Same; Non Expert; Subject of Testimony.*—A non-expert witness may testify whether the stumps left on the land were old or showed that the trees had been recently cut.

6. *Witnesses; Competency; Knowledge.*—A witness having testified that he was working for defendant, and hauling logs under his direction, may testify that he hauled the logs from the land in question in the direction of the defendant's mill, the action being for trespass for cutting timber.

7. *Trespass; Cutting Timber; Consent.*—Where the jury was authorized to draw from plaintiff's acts and other evidence an infer-

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ence that plaintiff did not consent to the cutting of the timber, the absence of positive testimony that he did not consent will not bar plaintiff from recovering in an action of trespass for cutting timber.

6. *Same; Instructions.*—Charges asserting that there was no evidence that the defendant took from plaintiff's land 300 pine trees already cut, as averred, or that defendant cut or sawed 300 pine trees from plaintiff's land, were misleading, in that, under them, the jury might be led to believe that the plaintiff should not recover unless he proved the cutting or hauling of 300 pine trees, when in fact, plaintiff was entitled to recover as a matter of law, for any less number proven.

APPEAL from Macon Circuit Court.

Heard before Hon. S. L. BREWER.

Action by C. E. Little against M. H. Bufford for damages for cutting trees from land. From a judgment for plaintiff, defendant appeals. Affirmed.

The first count is for cutting or sawing 300 pine trees growing upon the land of plaintiff, which is described as the E. $\frac{1}{2}$ of N. W. $\frac{1}{4}$ of section 21. The second count is for carrying away 300 pine trees, which had been cut down and were on the said land. The defense was the general issue. The witness testified that he did not count the trees, and that he did not know how many had been sawed, but that he had looked over the ground where the timber had been sawed on the land in suit, and in his best judgment there were 300 trees sawed. He was then asked by counsel if in his best judgment there could have been less than 250 trees cut or sawed. Objection was interposed and overruled to this question. The plaintiff testified that he wrote the defendant a letter, addressed it to him, put a two-cent stamp on it, and put it in the post office. Plaintiff's counsel then, after asking the defendant and his counsel to produce the letter and the letter being produced, asked the witness if he knew the substantial contents of the letter and what they were. Objection was interposed and overruled to this question, and witness answered that he knew the substantial contents of the letter, and that

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he wrote the defendant that he had depredated on his land and had cut his timber, and that he should have known better, and that he would expect him to pay for it, or he would prosecute him to the full extent of the law. Motion was made to exclude the answer, which was overruled. The objection to the question calling for the contents of the letter was that it was incompetent, illegal, irrelevant, and immaterial, and the motion to exclude the answer as to the contents of the letter was based upon the same grounds.

The following charges were refused to the defendant: “(1) Plaintiff must prove with certainty the averments of the complaint. There is no evidence before you that the defendant took away from the land of the plaintiff 300 pine trees already cut down, as averred in the complaint.” (2) Same as 1, except that there is no evidence that defendant cut or sawed 300 pine trees. (3) General affirmative charge to find for the defendant. (4) General affirmative charge to find for the defendant on the second count of the complaint. “(5) The plaintiff has averred that the defendant willfully and knowingly cut or sawed down 300 trees. The evidence before you does not show that this averment is true.” “(7) I charge you that, if you believe the evidence in this case, the plaintiff has not the legal title to the land on which the timber is alleged to have been cut. (8) I charge you that you must believe from the evidence that the defendant knowingly and willfully, and without the consent of the owner, cut or sawed 300 pine trees on the lands described in the complaint before you can find a verdict for the plaintiff.”

H. P. MERRITT, for appellant. This action is brought under section 4137, Code 1896. The statute is highly penal and must be strictly construed.—107 Ala. 640.

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The plaintiff must bring himself within the letter of the statute.—59 Ala. 510. The court erred in declining to exclude the statements of the witness Plant that he saw one Law hauling logs off this 80 acres of land, and that he was hauling them in the direction of defendant's sawmill.—*Williams v. Hendricks*, 115 Ala. 277. The statute does not permit a recovery for damages done more than twelve months before the filing of the suit. The court erred in refusing charge 1.—*Williams v. Hendricks*, *supra*. The court erred in refusing charge 2.—105 Ala. 549; 143 Ala. 228. Counsel discuss other assignments of error, but without citation of authority.

O. S. LEWIS, for appellee. Quantity, like time and value, may be testified to by a witness as to his best judgment.—*Bass v. Glasscock*, 82 Ala. 452; *Ry. Co. v. Watson*, 90 Ala. 41; *R. R. Co. v. Hill*, 93 Ala. 514; *Linehan v. The State*, 116 Ala. 479; *R. R. v. Riley*, 119 Ala. 260. The letter was produced and was competent evidence.—*Foxworth v. Brown Brothers*, 120 Ala. 67; *Galloway v. Glass*, 139 Ala. 512.

ANDERSON, J.—The letter, written by the plaintiff to the defendant, had been produced and was the best evidence; but the point was not taken by an objection to the proof of its contents. The objection was general, or, if specific, did not specify the ground covering the objectionable feature of the evidence introduced. A general objection, "because the same was illegal, irrelevant, and incompetent," cannot be sustained, unless the evidence is manifestly illegal and irrelevant, and apparently incapable of being rendered admissible in connection with other evidence.—*Sanders v. Knox*, 57 Ala. 83. Nor will the trial court be put in error for overruling a specific objection which does not cover the defect in the

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evidence offered.—1 Wigmore on Evidence, § 18. The contents of the letter from plaintiff to defendant, and his reply thereto, which was introduced in evidence, was legal, relevant, and competent, and was inadmissible for the sole reason that parol proof of its contents was secondary and the best evidence was accessible to the plaintiff.

There was no error in permitting the witnesses to give their best judgment as to the number of trees sawed down. It is true they did not count the stumps, but “looked over the ground where the timber had been sawed on the land.”—*Bass Furnace Co. v. Glasscock*, 82 Ala. 452, 2 South. 315, 60 Am. Rep. 748; *Railroad v. Riley*, 119 Ala. 260, 24 South. 858; *Railroad v. Hill*, 93 Ala. 514, 9 South. 722, 30 Am. St. Rep. 65; *Linnehan v. State*, 116 Ala. 479, 22 South. 662. Nor do we think it required an expert to tell whether or not the stumps were old or showed that the trees had been recently cut or sawed.

The evidence that Shirley Law hauled logs from the land in the direction of defendant's mill was made relevant by the subsequent evidence of Law, who testified that he was working for the defendant and hauling logs under his direction.

The trial court did not err in refusing charges 1 and 2 requested by the defendant. If not otherwise bad, they were misleading, as the jury might conclude therefrom that plaintiff could not recover unless he proved the cutting or hauling of 300 pine trees, when as matter of law he would be entitled to recover for any less number proven, and there was evidence from which the jury could infer that defendant had some of the logs sawed and hauled away.

The trial court did not err in refusing the other charges requested by the defendant. There was evidence from which the jury might infer that the plaintiff was

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the owner of the trees, especially as against a mere trespasser, and that the trees were sawed down and hauled away by the defendant's agents or servants, with his knowledge, and within a year prior to the commencement of the suit. It is true there was no direct proof that the plaintiff did not consent; but the acts of the plaintiff and other evidence before the jury could create an inference that the plaintiff did not consent.

The trial court did not err in refusing the motion for a new trial; and, as no reversible error was committed, the judgment of the circuit court is accordingly affirmed.

Affirmed.

HARALSON, SIMPSON, and DENSON, JJ., concur.

Buck v. Louisville & Nashville R. R. Co.

Trespass to Realty.

(Decided Feb. 11, 1909. 48 South. 699.)

1. *Trespass; Possession to Maintain.*—In order to recover for trespass to land a party must have been in possession, actual or constructive, at the time of the commission of the trespass; but it is not essential to his right of action that he be in possession at the commencement of the suit.

2. *Same; Damages.*—The measure of damages for trespass to realty is the difference in value of the land before and after the trespass.

3. *Railroads; Excavations; Liability of Purchaser.*—A railroad is not liable for excavating and other acts done in locating its track, etc., on plaintiff's land, where such acts were done by its predecessor, in an action for trespass to realty.

4. *Adverse Possession; Color of Title; Constructive Possession.*—The possession of a part of a tract of land under a deed does not give constructive possession of a portion of the tract, in the actual possession of another.

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5. *Same; Presumption; Abandonment*.—In the absence of proof of abandonment actual possession under color of title is presumed to continue when once shown.

6. *Same; Evidence*.—The evidence in this case stated and examined and held to require a submission to the jury to determine the abandonment of possession on an issue of adverse possession.

APPEAL from Jefferson Circuit Court.

Heard before Hon. A. A. COLEMAN.

Action by F. B. Buck against the Louisville & Nashville Railroad Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

The facts are sufficiently stated in the opinion. The following charge, given at the request of the defendant, is the one referred to in the opinion: "(A) I charge you that, if you believe from the evidence that at the time of the filing of this suit the defendant was in adverse possession of the land on which were its tracks and roadbeds, the jury must find for the defendant."

TROTTER & ODELL, for appellant. Having taken actual possession of a part, plaintiff took constructive possession of the whole land involved.—*Chastang v. Chastang*, 141 Ala. 451. The court erred in instructing the jury that if the evidence showed that at the time of the filing of the suit, defendant was in adverse possession of the land upon which its track was laid, the jury should find for the defendant.—*N. O. & S. R. R. Co. v. Jones*, 68 Ala. 48; 70 Ala. 227; *Southern Ry. Co. v. Hood*, 126 Ala. 315; *Segar v. Kirkley*, 23 Ala. 680; 28 A. & E. Ency of Law, 577; 7 A. & E. Ency of Prac. 691. The court erred in admitting the deeds to the Birmingham Mineral Railway Co.—*Dorland v. Westerritch*, 140 Ala. 282; 1 A. & E. Ency of Law, 858, et seq. At the time of the execution and delivery of the deed, the mortgage from which plaintiff derived his title, was recorded and outstanding.—*Farrow v. N. C. & St. L. R. R.*

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109 Ala. 448; *Duke v. The State*, 56 Ark. 485. The court erred in giving the charge as to the measure of damages and in admitting the evidence of Green and Smith.—*M. J. & K. C. R. R. Co. v. Riley*, 119 Ala. 260; *H. A. & B. R. R. Co. v. Matthews*, 99 Ala. 27; *Gasdin v. Williams*, 44 South. 611. A corporation possessing the right of eminent domain cannot enter upon the private property of another without first making compensation.—*N. O. & S. R. R. Co. v. Jones*, *supra*.

TILLMAN, GRUBB, BRADLEY & MORROW, for appellee. There was a verdict for the defendant, and hence, appellant can take nothing by his assignments relative to the proper measure of damages.—*Donovan v. S. & N. A. R. R. Co.*, 79 Ala. 429; *Carrington v. L. & N.*, 88 Ala. 472; *Christian v. Denmark*, 47 South. 82. The measure of damages is not the same as it would be in a condemnation proceeding, and no permanent injury is shown to the land.—*Abercrombie v. Wyndham*, 127 Ala. 182. There was no error in admitting the plea.—Sec. 1169, Code 1896, as amended by Acts 1898-9, p. 28. The witness Willoughby, as land agent of the defendant was competent to testify as he did.—*Hayes v. Lemoine*, 47 South. 100. The owner of the land cannot maintain trespass against one in adverse possession, and the evidence showed the possession of the defendant.—*Brooks v. Rodgers*, 99 Ala. 34; *Boswell v. Carlisle*, 70 Ala. 244; *Cooper v. Watson*, 73 Ala. 252. The court properly gave charge E.—*Barry v. Madaris*, 47 South. 152.

ANDERSON, J.—In order to recover in trespass, the plaintiff must show possession of the land, actual or constructive, when the alleged trespass was committed. The plaintiff never showed any actual possession—*possessio pedis*—to the strip upon which defendant's track

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was located, and therefore had to rely upon constructive possession given by his color of title, in connection with his actual possession of a part of the land embraced in his deeds. There is no field of operation, however, for constructive possession of one when the land is in the actual possession of another. The plaintiff never went into the actual possession of the strip in controversy, but constructed his fence so as to leave it out of his boundary, and the roadbed had been graded and erected and was open to observation. The defendant's grantor, the Mineral Railroad, went into possession of this strip under color of title to the easement only, before the plaintiff acquired the 20 acres of which the strip is a part, and when actual possession is shown, under color of title, the said possession is presumed to continue, in the absence of any proof of an abandonment. There was proof from which the jury could infer an abandonment of the roadbed before the defendant entered and laid its track, and, if they believed it had been abandoned by the Mineral road before the entry of the defendant, then the plaintiff was in the constructive possession at the time of the said entry by the defendant, and could maintain this action. It is true Wiloughby testified to going over the roadbed several times between 1887 and 1904; but this fact was not, of itself, sufficient to negative an abandonment, when taken in connection with the evidence that the company had chosen and used another connecting route, and the question of abandonment was clearly one for the jury.

There was no error in refusing to exclude the conveyance offered from the Village Creek Company to the Birmingham Mineral Railroad. It conveyed the right of way to 25 feet on each side from the center of the railroad as then located, and the proof shows that the road was at the time located and staked.—*Coyne v. Warrior*

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Southern R. R., 137 Ala. 554, 34 South. 1004. The plaintiff, in order to recover, must be in the possession, actual or consecutive, when the act or trespass complained of was committed, and it is not essential to his right to recover for him to be in possession at the commencement of the suit.—28 Am. & Eng. Ency. Law, 576; *Garratt v. Sewell*, 108 Ala. 521, 18 South. 737; *L. & N. R. R. v. Hill*, 115 Ala. 334, 22 South. 163. The trial court, therefore, erred in giving charge “A” requested by the defendant. It is true there is an expression used in the case of *Rogers v. Brooks*, 99 Ala. 34, 11 South. 753, to the effect that the plaintiff should have the possession of the land both at the time of the trespass and of the institution of the action; but the court was dealing with a penal action for cutting trees. Moreover, this expression is in conflict with the rule as correctly stated in the former part of the opinion in said case.

Since this case must be reversed, as we view the evidence, there are but two questions to be considered upon the next trial, there being no material change in the evidence. First, the plaintiff's right to recover, which is, as we have indicated, a question for the jury; second, the measure of damages in case of a recovery. The rule is the difference in the value of the tract of land before and after the acts constituting the trespass. The complaint claims for “excavating, filling,” etc.; but the proof shows that the roadbed was graded and completed long before the defendant entered, and by the Birmingham Mineral Railroad. The defendant would not be liable for the acts of its grantor, but only for its own acts. The damage to the land should, therefore, be confined to the difference in the market value of the land immediately before and after the acts of the defendant' and not some third person. In other words, what damage did

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the defendant do the land, and not what damage was done by the Birmingham Mineral Railroad.

The judgment of the circuit court is reversed, and the cause is remanded.

Reversed and remanded.

DOWDELL, C. J., and McCLELLAN and MAYFIELD, JJ.,
concur.

Coleman v. Pepper.

Trespass to Lands.

(Decided April 2, 1909. 49 South. 310.)

1. *Trespass to Realty; Damages; Aggravating Circumstances.*—Where the acts of trespass complained of are attended by aggravating circumstances of wantonness or malice, exemplary damages may be recovered for trespasses to realty.

2. *Damages; Punitive Damages.*—Punitive damages are not recoverable as a matter of right, being apart from compensation, but their imposition is discretionary with the jury, the discretion being a sound and legal one not to be exercised arbitrarily.

3. *Same; Instructions.*—The court should instruct the jury on the question of punitive damages in such a way that they will understand that in fixing such damages they should consider the enormity of the wrong and the necessity of preventing similar wrongs, and that they should impose such an amount as in their sound judgment the exigencies of the case demand not to exceed the amount claimed.

4. *New Trial; Grounds; Misleading Instructions.*—The trial court may set aside such verdict on account of misleading charges given if convinced that prejudice has resulted therefrom.

APPEAL from Limestone Circuit Court.

Heard before Hon. D. W. SPEAKE.

Action by Mattie B. Coleman against L. B. Pepper for trespass to realty. There was judgment for plaintiff, but on motion the judgment was set aside and new trial granted. From this last judgment plaintiff appeals. Affirmed.

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JAMES E. HORTON, JR., and ERLE PETTUS, for appellant. A new trial should not be granted for a mere difference between the court and the jury as to the proper amount of damages that should be awarded.—*Tenn. C. I. & R. R. Co. v. Sterens*, 115 Ala. 461; *Cobb v. Malone*, 92 Ala. 630; 14 En. of Pl. & Pr. 764, & 772. Where there is no legal measure of damages, as in torts, the amount is referred to the discretion of the jury, and no mere difference of opinion as to the amount of damages will justify an interference by the court unless the amount is so unreasonable and excessive as to be indicative of passion, prejudice, partiality, or corruption of the jury.—14 En. of Pr. p. 756 & p. 777; 8 Am. & En. of Law (2d Ed.) p. 629; *Huckle v. Money*, 2 Wilson, 205, (Extract from opinion cited in 3 Parson on Contracts, 8th Ed. p. 175 n. o.) In an action of trespass quare clausum fregit, exemplary damages may be given, where the tortious act is attended with circumstances of aggravation.—*Western Union Telegraph Co. v. Dickens*, 45 So. 469; *Mitchell v. Billingsley*, 17 Ala. 391; *Parker v. Misc.*, 27 Ala. 480; *Devaughn v. Heath*, 37 Ala. 597, (595); *Rosser v. Bunn*, 66 Ala. 93, (89); 13 Cyc. p. 112; 28 Am. & En. of Law, (2d Ed.) p. 610; *L. & N. R. R. Co. v. Smith*, 141 Ala. 335. Where the injury is wanton or wilful the jury are authorized to give any amount of damages beyond the actual injury as a punishment.—*Parker v. Misc.*, 27 Ala. 480; *Mitchell v. Billingsley*, 17 Ala. 391; *Ala. G. S. R. Co. v. Frazier*, 93 Ala. 48; *Mobile F. O. Co. v. Little*, 108 Ala. 399; *Ala. G. S. R. Co. v. Burgess*, 119 Ala. 555; *Western U. Tel. Co. v. Seed*, 115 Ala. 670; 13 Cyc. p. 110. In an action for unliquidated damages for a tort, the trial court has the power to permit the entry of a remittitur.—18 En. of Pl. & Pr. 125; *Ala. G. S. R. Co. v. Burgess*, 119 Ala. 555; *B'ham Electric Co. v. Ward*, 124 Ala. 409.

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W. R. WALKER, for appellee. The spirit in which a trespass is committed may be shown in mitigation of damages.—3 Joyce on Damages, §§ 2116-17; *Sparkman v. Swift*, 81 Ala. 231; *Burns v. Campbell*, 71 Ala. 271; *Jenkins v. Cooper*, 50 Ala. 419; *Barrett v. City of Mobile*, 129 Ala. 179; Code of 1896, § 3898. Any facts or circumstances which were an inducement to the transaction, which is an occasion of an action, are admissible in evidence in mitigation of damages.—*Bolling v. Wright*, 16 Ala. 664; *Bird v. Womack*, 69 Ala. 390; 28 Am. & Eng. En. Cyc. Law (2d.) 603. Exemplary damages may only be recovered if the trespass of which complaint is made was committed with a bad motive, with an intent to harass, oppress or injure; though the fact that it is wantonly, recklessly, or knowingly committed is a circumstance which may go to the jury for its consideration as to the question of malice.—3 Joyce on Damages, § 2116; *Alley v. Daniel*, 75 Ala. 403; *DeVaughan v. Heath*, 37 Ala. 595; *Lienkauf v. Morris*, 66 Ala. 406; *Garrett v. Sewell*, 108 Ala. 531; *Parker v. Mise*, 27 Ala. 480; *Garrett v. Sewell*, 93 Ala. 9; *Wilkerson v. Searcy*, 76 Ala. 176; *L. & N. Ry. v. Bizzell*, 131 Ala. 429; *Brinkmeyer v. Bethea*, 139 Ala. 376; *Mitchell v. Billingsley*, 17 Ala. 391; *Rhodes v. Roberts*, 1 Stewart, 145; *Snedecor v. Pope*, 143 Ala. 275. Where exemplary damages are claimed and are recoverable, the court should not, by its charge, give to the jury, “A discretionary power without stint or limit, highly dangerous to the rights of the defendant;” for such instructions or instructions, “leaves them without any rule whatever.”—*Alley v. Daniel*, 75 Ala. 403; *Lienkauf v. Morris*, 66 Ala. 405; *S. & N. Ry. v. McLendon*, 63 Ala. 266; *Southern Ry. Co. v. Bunnell*, 138 Ala. 247; *Garrett v. Sewell*, 108 Ala. 525; 2 Thompson on Trials, §§ 2073, 2074, 2076. Where the lower court grants a new trial and the appeal is from that ruling, the decision of the

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lower court "will not be reversed unless the evidence plainly and palpably supports the verdict."—*Cobb v. Malone*, 92 Ala. 630; *White v. Blair*, 95 Ala. 148; *Roe v. Doe*, 43 So. Rep. 856. If any ground of motion for a new trial is well taken the action of the trial court in granting it will not be reversed by this court.—*Smith v. Tombigbee & N. Ry. Co.*, 141 Ala. 332.

DENSON, J.—That exemplary damages are recoverable in this class of actions, when the acts complained of are attended with aggravating circumstances of wantonness or malice, cannot longer be a debatable question in this jurisdiction.—*Mitchell v. Billingsley*, 17 Ala. 391; *De Vaughn v. Heath*, 37 Ala. 595; *Rosser v. Bunn*, 66 Ala. 89; *Western Union, etc., Co. v. Dickens*, 148 Ala. 480, 41 South. 469. The jury awarded the plaintiff damages to the amount of \$311, and there can be no doubt that exemplary damages were assessed. On motion made by the defendant, the verdict was set aside, on the grounds that the damages were excessive and that the court erred in giving a charge requested by the plaintiff. The charge referred to is in this language: "I charge you, gentlemen of the jury, if you find that the defendant did trespass on the lands of the plaintiff, and if you further find that he did it in a wanton and willful manner, then you are not confined to the assessment of the actual damages sustained, but you may go further and assess punitive damages, not exceeding \$1,200." It is argued that this charge is erroneous, as giving the jury a discretionary power in the assessment of damages, "without stint or limit, and without any rule whatever."

Punitive damages, being apart from compensation, are not recoverable as a matter of right. Their imposition is discretionary with the jury.—*Louisville & Nashville Railroad Co. v. Bizzell*, 131 Ala. 429, 30 South. 777; 12

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Am. & Eng. Ency. p. 51, and cases cited in notes to the text. And this discretion is not an unbridled or arbitrary one, but a legal, sound, and honest discretion; and, after instructing the jury in respect to the elements which must be found to exist to warrant the assessment of such damages, in submitting to the jury the question of imposing punitive damages, the court should always safeguard the submission with such instructions as that the jury will not be misguided, but will be held mindful, in fixing such damages, that they should act with due regard to the enormity or not of the wrong, and to the necessity of preventing similar wrongs, and that, if such damages are imposed, they should be in such an amount (much or little) as, under all the circumstances attending the commission of the wrong, the exigencies of the case, in the sound judgment and discretion of the jury, may demand, in no event to exceed the amount claimed in the complaint.—*L. & N. R. R. Co. v. Bizzell*, *supra*: 12 Am. & Eng. Ency. p. 54, and cases cited in note 4 to the text; 13 Cyc. 119. The charge in judgment, while it may state the elements which, if found to exist, would form the proper basis for the assessment of exemplary damages in the discretion of the jury (*Snedecor v. Pope*, 143 Ala. 275, 290, 39 South. 318; *White v. Spangler*, 68 Iowa, 222, 26 N. W. 85), clearly leaves the jury with no rule whatever for the guidance of their discretion in the assessment of such damages (*Alley v. Daniel*, 75 Ala. 403; *Garrett v. Sewell*, 108 Ala. 521, 18 South. 737); and for this reason, while we do not decide that the trial court committed reversible error in giving it, we do hold that the charge possesses misleading tendencies and that it might properly have been refused (*A. G. S. R. R. Co. v. Burgess*, 119 Ala. 155, 25 South. 251, 72 Am. St. Rep. 943). Furthermore, we entertain no doubt of the right of a trial court to set aside a verdict on account of a misleading charge having been given, if convinced that pre-

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judice resulted from the giving of such charge.—*Goldsmith v. McCafferty*, 101 Ala. 663, 15 South. 244.

The trial court, we think, occupied a more advantageous position than this court does for determining whether or not the jury were misled by the charge given in this case, and we therefore decline to disturb its judgment granting the new trial. It is not necessary to consider the other grounds set down in the motion for a new trial.

Affirmed.

DOWDELL, C. J., and SIMPSON and MAYFIELD, JJ., concur.

Tallassee Falls Mfg. Co. v. First National Bank of Alexander City.

Trover and Case.

(Decided April 13, 1909. 49 South. 246.)

1. *Trover and Conversion; Complaint; Failure to Aver Time.*—A complaint in trover which fails to aver the time of the alleged conversion is insufficient and open to demurrer. (Form 24, page 1199, Code 1907.)

2. *Same; Pleading; Sufficiency of Plea.*—A plea as an answer to an action brought by a mortgagee which alleges that the proceeds of the goods alleged to have been converted, had been applied to a lien upon the goods superior to that of plaintiff, but which fails to allege the ownership of the lien is too indefinite and uncertain and open to demurrer as such.

3. *Same; Title to Sustain.*—In order to sustain an action of trover and conversion the plaintiff must have at the time of the conversion title to the property converted, general or special, and possession, or the immediate right of possession; and where the plaintiff claims under a mortgage on a growing crop by the terms of which the property was to remain with the mortgagor until a specified future date, such plaintiff could not maintain trover where a conversion of the property occurred before that time.

APPEAL from Tallapoosa Circuit Court.
Heard before Hon. S. L. BREWER.

[Tallassee Falls Mfg. Co. v. First National Bank of Alexander City.]

Action by the First National Bank of Alexander City against the Tallassee Falls Manufacturing Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

The second count of the complaint is as follows: "Plaintiff further claims of defendant the sum of \$150, for that, whereas, the plaintiff held and owned a mortgage executed and delivered to it by W. G. McDaniel, which mortgage covered the entire crop of corn, fodder, cotton, cotton seed, oats, wheat, peas, potatoes, and all other agricultural products grown and raised by the said McDaniel during the year 1905 in Elmore county, Ala. And plaintiff avers that said McDaniel did grow and raise a crop of cotton in Elmore county during said year; that, after the same was so grown and raised, defendant, with full knowledge of the existence of said mortgage, received from said McDaniel four bales of lint cotton of said crop, and converted the same to its own use, without the knowledge and consent of the plaintiff." Demurrers were interposed to this count, because it does not allege the date of the alleged conversion.

Defendant's second plea was as follows: "Defendant says that the proceeds of the cotton alleged to have been converted by the defendant was applied to the payment of a lien upon said cotton, which was a prior lien to any lien plaintiff held upon said property." Demurrers were interposed, and sustained to this plea because it fails to show whether the lien mentioned therein was held by the defendant or a third party.

J. M. CHILTON, LACKEY & BRIDGES, and GEORGE A. SORRELL, for appellant. The 1st and 2nd ground of demurrer to the second count of the complaint should have been sustained.—*Patrick v. DeBardelaben*, 90 Ala. 13; *Ware v. Dudley*, 16 Ala. 742; *Lacey v. Holbrook*, 4 Ala.

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88. The date of the conversion should have been alleged.—Section 5384, Code 1907. The court should have given the affirmative charge for the defendant.—*Johnson v. Wilson*, 137 Ala. 468; *Fields v. Copeland*, 121 Ala. 644; *Elmore v. Simon*, 67 Ala. 526; *Holman v. Ketchum*, 45 South. 206. Under the proof, the contract of cultivation falls directly under section 4743, Code 1907, and hence, the mortgagee cannot maintain trover for its conversion.—*Jordan v. Lindsey*, 132 Ala. 567; *Carleton v. Kimbrough*, 150 Ala. 618; *Hendricks v. Clemmons*, 41 South. 306.

BULGER & RYLANCE, and P. O. STEVENS, for appellee.
No brief came to the Reporter.

DOWDELL, C. J.—The second count of the complaint failed to aver the time of the alleged conversion. Form 24, p. 1199, Civ. Code 1907; *Mobile, J. & K. C. R. R. Co. v. Bay Shore Lumber Co.*, 158 Ala. 622, 48 South. 377; *Williams v. McKissack*, 125 Ala. 544, 27 South. 922. The demurrer was well taken on this ground, and should have been sustained.

The second plea was indefinite and uncertain in averment as to the ownership of the alleged prior lien, and was therefore open to the demurrer. If the ownership of the lien was in a third person, then the averments of the plea were insufficient, under the authority of *Keith & Son v. Ham*, 89 Ala. 590, 7 South. 234. It is a well-settled principle that, in order to sustain the action of trover, the plaintiff must have at the time of the alleged conversion the right of property; that is, title, general or special, and the possession, or an immediate right of possession.—*Johnson v. Wilson & Co.*, 137 Ala. 468, 34 South. 392, 97 Am. St. Rep. 52; *Fields v. Copeland*, 121 Ala. 644, 26 South. 491; *Elmore v. Simon*, 67 Ala. 526.

[Gulf Yellow Pine Lbr. Co. v. Monk.]

The plaintiff claimed under a mortgage given on a growing crop, or crop to be grown, and by the terms of which the property remained in the mortgagor until the 15th of October, 1905, and until which time there was no right of possession in the plaintiff. The undisputed evidence showed that the alleged conversion took place on the 27th of September, 1905. At this time the plaintiff had no immediate right of possession. On this evidence, being as it was, undisputed, the defendant was entitled to the general charge, as requested in writing and the court erred in its refusal.

For the errors indicated, the judgment is reversed, and the cause remanded.

Reversed and remanded.

SIMPSON, DENSON, and MAYFIELD, JJ., concur.

Gulf Yellow Pine Lbr. Co. v. Monk.

Trover.

(Decided April 22, 1909. 49 South. 248.)

1. *Words and Phrases; Timber.*—Timber as used in common parlance, is such stuff as is suitable for building and allied purposes.

2. *Logs and Logging; Contracts for Cutting; Construction.*—Where the contract gave the right to cut all merchantable trees upon certain land, timber to cut 12 inches at the stump, it was the intent of the parties that the trees so cut should be suitable for conversion into merchantable timber, and that the trees should measure 12 inches in diameter at the stump, or at the point where cut, and hence, the cutting of trees 4 inches in diameter at the point where cut was not within the contemplation of the contract, although such trees might measure 12 inches in circumference.

APPEAL from Geneva Circuit Court.

Heard before Hon. H. A. PEARCE.

[Gulf Yellow Pine Lbr. Co. v. Monk.]

Trover by H. M. Monk against the Gulf Yellow Pine Lumber Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The evidence for the plaintiff tended to show that he purchased the land from one S. A. D. Ellis on which the timber was cut, and that he went upon the land after the cutting of the timber by defendant and measured timber that was cut, and that he kept an account of all the stumps which measured less than 12 inches in diameter at the point of cutting, and that the number of trees thus cut below the 12 inches were 115. The defendant introduced a deed from Ellis conveying the timber on the land to the Morris Lumber Company, and showed a purchase from the Morris Lumber Company of the timber. The deed conveyed all merchantable pine trees standing on the described land, and provided that the timber was to cut 12 inches at stump, with the right of entry, etc., usual in such conveyance. The defendant took the position that the deed conveyed all the timber on the land, and that the expression "timber to cut 12 inches at stump" was meaningless, when it came to the proposition as to the diameter of the timber to be cut, and upon this theory requested the general affirmative charge.

See, also, 153 Ala. 358, 45 South. 223.

W. O. MULKEY, for appellant. The deed unaided by any evidence is void because it has no meaning when it says timber to cut 12 inches at the stump. In any event, it stands upon the same principle that obtains where there is a time fixed in the deed for the removal of the timber, and is a covenant and not a condition.

R. P. COLEMAN, and ESPY & FARMER, for appellees. No brief came to the Reporter.

[Gulf Yellow Pine Lbr. Co. v. Monk.]

SAYRE, J.—The single complaint on this appeal predicates error of the rulings of the trial court in refusing the general affirmative charge to the defendant in the court below, appellant here. Defendant was the owner by assignment of a contract with plaintiff by which it had a right to cut all “merchantable” trees upon plaintiff’s land, “timber to cut 12 inches at the stump.” The evidence tended to support the contention that defendant had cut trees less than 12 inches in diameter at the point of cutting. Appellant’s theory is that the stipulation quoted is meaningless and of none effect, or that it could just as well mean a stump 12 inches above the ground, or trees 12 inches in circumference. But we do not agree. The common intent of the parties was that the trees cut should be suitable for conversion into merchantable timber. Timber is such stuff as is suitable for building and allied purposes. Unless we affect to be ignorant of matters of everyday experience and observation, we must know that a tree 4 inches in diameter—diameter being approximately one-third of circumference—at the stump, or point where cut, squared, sawed, or otherwise prepared for use and the market, will not afford timber. The consideration, along with the context, gives unmistakable clue to the meaning of the stipulation in question. It related to the timber to be cut, and not to the useless stump to be left. It meant that the timber should measure not less than 12 inches in diameter at the point where severed from the stump.

Affirmed.

DOWDELL, C. J., and ANDERSON and McCLELLAN, JJ.,
concur.

[Sloss-Sheffield S. & I. Co. v. Dorman, Admr.]

**Sloss-Sheffield S. & I. Co. v.
Dorman, Admr.,**

Damages for Causing Overflow of Land.

(Decided April 15, 1900. 49 South, 242.)

Limitation of Action; Accrual of Right of Action; Overflowing Lands.—In an action for injuries to land from overflow caused by the neglect of the railroad company to keep open culverts lawfully erected, limitations begin to run from the time of the injury and not from the time of the construction of the railway.

APPEAL from Jefferson Circuit Court.

Heard before Hon. A. A. COLEMAN.

Action by H. T. Dorman against the Sloss-Sheffield Steel & Iron Company. From a judgment for plaintiff defendant appeals. Affirmed.

The plea under discussion is plea No. 4, and is as follows: "Defendant, for further answer to the complaint, and to each count separately and severally, says that the defendant, at a time more than 10 years before the commencement of this action and the time of the grievances complained of, constructed the said trestle, culverts, openings, and embankments along and near the plaintiff's said land in the way and manner complained of in said complaint for the passage of water which had to flow through, and for the drainage of the plaintiff's said land, and committed at said time the other grievances charged in the complaint; and defendant avers that since the original construction of said trestle, culverts, and openings, the defendant has continued to maintain said obstructions up to the time of the commencement of this suit, with the same effect of overflowing and damaging plaintiff's land in time of high water, and to the same extent during the said period of 10

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years as to the time this suit was brought and the grievances complained of occurred, of which plaintiff made no complaint, but acquiesced therein; and the defendant avers that during the said period of 10 years before the commencement of this suit the defendant claimed the right to maintain, and did maintain, the said pipes, culverts, and openings near the plaintiff's said property openly, notoriously, adversely to the plaintiff and all the world, and under claim of right to do so, and has thereby now acquired by prescription or adverse possession the right as against the plaintiff to so maintain its said trestle, culverts, and openings with effect, causing the water to overflow plaintiff's said land as alleged in the complaint was done."

TILLMAN, GRUBB, BRADLEY, and MORROW, and CHARLES E. RICE, for appellant. The court erred in sustaining appellee's demurrer to the appellant's 4th plea.—*Shahan v. A. G. S. R. R. Co.*, 115 Ala. 181.

SAM WILL JOHN, for appellee. The question discussed by appellant is settled adversely to its contention in the case of *S. A. & M. Ry. Co. v. Buford*, 106 Ala. 813.

DENSON, J.—This is an action by H. T. Dorman against the Sloss-Sheffield Steel & Iron Company to recover damages for injury to the plaintiff's land, consequent to the overflow thereon of surface water. Such damage is alleged to have been caused by the neglect of the defendant to keep open the waterways or culverts under its railroad, through which flowed the waters of a stream that naturally drained the surface water from plaintiff's land, in that the waters of this stream, being by such negligence checked, obstructed, and prevented from freely flowing away, were thrown back upon

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the plaintiff's land, so submerging it and depositing refuse matter thereon as to depreciate its value. The injuries complained of are averred to have occurred in the years 1904 and 1905, and the action was begun on July 7, 1905. The defendant suffered judgment in the court below, and therefrom to this court brings his appeal.

The only question submitted for decision by the assignment of errors is the sufficiency or not of plea 4, by which defendant sought in the trial court to set up a prescriptive right in bar of the action, acquired by adverse user of 10 years. The appellant contends that, according to the rulings made in *Shahan v. Alabama Great Southern Railroad Co.*, 115 Ala. 181, 22 South. 449, 67 Am. St. Rep. 20, the plea is sufficient, and the court erred in sustaining the demurrer thereto. On the other hand, appellee contends that the judgment on the demurrer finds full support in the case of *S. A. & M. R. R. v. Buford*, 106 Ala. 303, 17 South. 395. These are the only authorities cited in briefs of counsel.

We are not driven to the necessity of overruling either of the cases cited, for they are not in conflict. In the *Shahan Case* the gravamen of plaintiff's cause of action consisted in the negligent construction of the embankments and culverts complained of. Of the complaint the court said: "The gist of the complaint is the averred negligence of the defendant in failing to construct and maintain sufficient openings for the passage of the water which fell on that day." It was held on that occasion that 10 years' adverse user, properly pleaded, would be sufficient answer to the cause of action alleged, which cause of action, as we have shown, proceeded upon the theory of negligence in the construction of the embankment and culverts, by which they were necessarily rendered injurious. In the case in judgment the complaint alleges no negligence in the construction of the water-

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ways or culverts under defendant's railroad, but the gravamen of it is that defendant allowed its waterways and culverts to become filled up, and that their capacity for carrying off the water was decreased by defendant's permitting them to become so clogged. So far as the waterways and culverts, in themselves, are concerned, they were amply sufficient, in their manner of construction and their dimensions, to carry off all the water, and were therefore not necessarily injurious, or invasive of the rights of others, and of themselves afford no cause of action.

In this state of the case, according to the ruling made in *S. A. & M. Railway v. Buford*, *supra*, whatever of legal injury may result from the failure to keep open the waterways or culverts "furnishes a cause of action accruing when the injury occurs, and then the statute of limitations commences to run, and there may be as many successive suits and recoveries as there are successive injuries." In other words, as was said in the *Buford Case*, the waterways and culverts "were lawful structures, lawfully erected, and furnished plaintiff no cause of action. Plaintiff's legal injury, which gave him a cause of action, was coincident with the overflow of his land," caused by the filling up of the waterways or culverts, "and it is from the happening of the injury the statute of limitations commenced to run."—*Polly v. McCall*, 37 Ala. 20.

It follows that the plea is insufficient, and that the court properly sustained the demurrer thereto.

Affirmed.

DOWDELL, C. J., and SIMPSON and MAYFIELD, JJ., concur.

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Action for Damage to Goods on Account of Defective Water Pipe.

(Decided Feb. 3, 1909. 48 South. 705.)

1. *Landlord and Tenant; Leased Premises; Injuries From Defects.*—A tenant takes premises in the condition in which they are when leased, and the landlord is not liable to the tenant for injury to the tenant's property resulting from the unsafe condition of the premises unless the landlord has agreed to repair or has misrepresented the condition of the premises; and this is true, whether the tenant rents all or only a part of the premises.

2. *Same; Injuries from Defective Condition; Complaint.*—Counts which allege that plaintiff leased the lower story of the defendant's building; that there were pipes running through a portion of the building to convey water to the second floor and that one of them burst, and water leaked through the second story on plaintiff's goods; that defendant was negligent in that the pipes were defective and unsound, and that it was the duty of defendant to keep the pipes in a sound condition, and on account of his failure they burst, charged negligence in that the pipes were defective, and are, therefore, demurrable on account of a failure to show a covenant to repair, an agreement in respect to the condition of the building or a misfeasance on the part of the landlord.

3. *Same; Pleading.*—The averment that the defendant landlord was the owner of the premises and had charge and control of the water pipes, by and through her agent, and knew that said pipes were defective and unsound and negligently failed to repair the same is not equivalent to an averment that the pipes were defective at the time of the lease or negative the fact that the tenant knew it, and made no effort to ascertain the condition of the premises.

4. *Same.*—In an action by a tenant of the first floor of the building against the landlord for injuries from water pipes bursting on the second floor, a count which avers that the landlord had at the time the care and charge of keeping such pipes in repair and good order; that it was her duty to do so, and in the exercise of such care and charge defendant failed to keep said pipes in good order and was negligent in using weak and defective pipes, and that by reason thereof, the pipes burst or leaked, and that such negligence is the proximate cause of the damages, being on the theory of a failure to keep in repair a portion of the building not rented to plaintiff is demurrable for failing to aver knowledge or notice of the defect on the part of the defendant.

5. *Pleading; Conclusions.*—An averment, in an action by a tenant against a landlord for damages from the bursting of a water pipe, that it was the duty of defendant to keep the pipes in a sufficiently

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safe condition so as to safely convey water, except by way of conclusion averred no duty on the landlord.

6. *Same; Construed Against Pleader.*—The words, charge and control, as used in the counts of the complaint are susceptible of being construed as referring to the time when the lease was made, and will be so construed as against the pleader.

7. *Same; Complaint; Reference to Other Counts.*—Where a count in a complaint is rendered unintelligible by reference to another count, which was perhaps inadvertently put in, the court cannot change the writing but must read it as found.

8. *Negligence; Condition and Use of Premises; Care Required in General.*—Where the complaint is by the occupant of the lower floor of a building against the occupant or a person in control of the upper floor for damages by the bursting of a water pipe on the second floor, based on the duty of one to so use his property as not to injure another, it need not aver the relationship between the parties, whether that of tenant or landlord, or that of distinct ownership.

9. *Same; Complaint.*—A complaint alleging that plaintiff was lawfully in possession of stores on the grade floor of a certain building and had a large quantity of goods stored therein; that defendant was the owner and had charge of certain lavatories and the pipes used to convey water to the same; that said pipes were defective, unfit to convey water with safety, and that they burst and water flowed through on plaintiff's goods; that defendant had notice of the defective condition of the pipes several days prior to their bursting, and that their bursting would be liable to injure plaintiff's goods; that defendant was the owner, had the care and control of said hallway along which the pipes ran, and of the lavatory and pipe, but negligently failed to keep said pipes in repair, and that as a result, etc., plaintiff was damaged, states a cause of action of duty of one to so use his property as not to injure others, and is not demurrable.

(Tyson, C. J., Denson and Anderson, JJ., dissent.)

APPEAL from Birmingham City Court.

Heard before Hon. C. W. FERGUSON.

Action by Charlie's Transfer Company against Mrs. S. C. Malone for damages to goods on account of defective water pipes. Judgment sustaining demurrers to the complaint, and plaintiff appeals. Reversed and remanded.

The complaint was as follows:

"(1) Plaintiff claims of defendant the sum of \$600 as damages, for that heretofore, to wit, plaintiff rented and leased out to defendant from October 1, 1904, to September 30, 1905, two storehouses on the grade floor of a building, said building being located in the city of Bir-

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mingham, state of Alabama, and known as No. 1908 and No. 1910 Avenue D, Southside; the aforesaid storehouses to be used by plaintiff as a warehouse. The plaintiff occupied said aforesaid storehouse according to the terms of said lease on, to wit, October 1, 1904, and stored in said storehouse No. 1908 a large quantity of household goods, furniture, and things of value of various kinds; said property being rightfully and lawfully in possession of the plaintiff. That the defendant was the owner of said storehouse No. 1908, and of the aforesaid building, and that there were pipes running through a portion of said building for the purpose of conveying water to or from the closet or lavatory on the second floor in the aforesaid building. That on, to wit, the 22d day of November, 1904, one or more of the aforesaid pipes which conveyed water to or from the lavatory or closet in the rear end of the hallway on the second floor of the aforesaid building burst, and a large quantity of water escaped therefrom, and leaked through the second story of the aforesaid building, and upon the aforesaid household goods, furniture, and things of value, which were stored in the aforesaid storehouse No. 1908 by the plaintiff, said household goods and furniture, being then and there rightfully and lawfully in possession of the plaintiff, and by reason whereof a large portion of aforesaid household goods, furniture, and things of value were destroyed, and a large portion of them injured. The plaintiff avers that defendant was negligent, in that the pipe or pipes used to convey water to or from the lavatory or closet in the rear end of the hallway on the second floor of the aforesaid building were defective and unsound. [Here is inserted by way of amendment the following: "That it was the duty of said defendant to keep said pipes in a sufficiently safe and sound condition so as to safely convey water to and from its lavatory

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and closets. That the defendant negligently failed to do so." And by reason whereof aforesaid pipe or pipes burst, and water escaped from or leaked through the second story of said building, and upon the aforesaid property which was stored in said storehouse No. 1908 by the plaintiff, to its damage as aforesaid."

(2) Same as 1, down to and including the words, "and another large portion of them were injured," where they occur together in said count, and adding the following: 'And plaintiff avers (amendment as follows: "That the defendant was the owner of said premises, and had charge and control of said pipes through her agents, and knew that said pipes were defective and unsound, and negligently failed to repair same.") That the defendant was negligent in using or allowing to be used a defective or unsound pipe or pipes in aforesaid building, for the purpose of conveying water to or from the lavatory in the rear end of the hallway in the second story of aforesaid building, and by reason whereof said pipe or pipes burst, and water escaped therefrom, and flowed through the second story of aforesaid building, and upon aforesaid property stored in storehouse No. 1908-by the plaintiff, to its damage as aforesaid."

(3) Same as 1, down to and including the words, "and injured another large portion of them," where they occur together in said count, and adds: "The plaintiff avers that it has been damaged by reason of the negligence, in that the defendant used a defective or unsound pipe or pipes for the purpose of conveying water to or from the lavatory or closet in the rear end of the hallway on the second floor of the aforesaid building. That the said pipe or pipes were unable to hold or control said water, and by reason whereof said pipe or pipes burst, and water escaped or leaked through the second story of aforesaid building, and upon the aforementioned proper-

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ty which was stored in storehouse No. 1908 by the plaintiff”

The fourth and amended count is as follows: “The plaintiff adopts all of the first count down to and including the words, ‘and another large portion of them were injured,’ and adds the following: ‘The plaintiff avers that the defendant had at the said time the care and charge of keeping said pipes which conveyed water to and from the lavatory and closet on said second floor of said building in repair and good order, and that it was her duty to do so. The plaintiff avers that the defendant, in the exercise of such care and charge over said water pipes, failed to keep said pipe in good order, and was negligent, in this: That she used weak and defective pipe on second floor to convey water to and from said lavatory or closet. That by reason of said negligence in so using said defective pipes they burst or leaked, and large quantities of water flowed therefrom and leaked through the second floor of said building into the plaintiff’s store and upon his goods and things of value stored therein, to his damage as aforesaid. The plaintiff further avers that the negligence of the defendant in the control and management of her said water pipes and lavatory on the second floor was the proximate cause of the damage caused the plaintiff.’

“(5) Plaintiff claims of the defendant the sum of \$600 as damages aforesaid, for that heretofore, to wit, on the 22d day of November, 1904, and for several weeks prior thereto, plaintiff was lawfully and peaceably in possession of two stores on the grade floor of a building known as No. 1908 and No. 1910, Avenue D, Southside, in the city of Birmingham, and on said date had stored therein in storehouse No. 1908 a large quantity of household goods, furniture, and things of value of various kinds, which said property was then and there rightfully

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and lawfully in the possession of the plaintiff. That the defendant, on, to wit, said date, was the owner and had charge, care, and control of certain closets and lavatories and the pipe used to convey water to and from the same, which she operated at the rear end of a hallway which ran through the center of the second floor in said building. That the said hallway, closets, and lavatories were operated by the defendant for the use of all her tenants in common who occupied said second floor. That there were water pipes running along said hallway, which conveyed water to and from said lavatory, and that the said pipes were defective, unsound, and unfit to convey water with safety to and from said lavatory, and that by reason of said defective condition of said pipes they burst on, to wit, the 22d day of November, 1904, and large quantities of water escaped and flowed therefrom upon said hallway, and through the second floor, and upon the said household goods, furniture, and things of value of the plaintiff, thereby destroying a large portion of them and materially injured another large portion of them. The plaintiff avers that the defendant was negligent in using and caring for said defective pipes as aforesaid, and further avers that the said negligent use and care of said pipes as aforesaid by defendant was the proximate cause of its damage as aforesaid."

(6) Same as fifth, down to and including the words, "and materially injured another large portion of them," and adds: "The plaintiff avers that defendant had notice of the defective condition of said pipe several days prior to the bursting of same, and that the bursting of same would be liable to result in injury to plaintiff's goods. That she was the owner and had the care and control of said hallway, lavatory, and pipes, but nevertheless negligently failed to keep said pipes in repair;

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and plaintiff avers that as a proximate result of said negligence plaintiff was damaged as aforesaid.

"(7) The plaintiff adopts all of the first count thereof, down to and including the words, 'and materially injured a large portion of them,' and adds: 'The plaintiff avers that the defendant was in possession, and the owner and had care and control of said hallway, pipes, and lavatory, and that it was her duty to keep same in a reasonably safe condition (in such a condition as not to injure the property of the plaintiff by their use), and that she negligently failed to so keep same. The plaintiff avers that said negligence was the proximate cause of plaintiff's damages as aforesaid.' "

The grounds of demurrer take the points decided in the opinion.

CHARLES J. DOUGHERTY, for appellant. The law charges the owner of property with the duty of using it so as not to injure the property of another.—(*Crommelin v. Cox*, 30 Ala. 318; *Moody v. McLellan*, 39 Ala. 45; *Watson v. Oxanna Land Co.*, 92 Ala. 320; *Buckley v. Cunningham*, 103 Ala. 449; *Meyer v. Hutchinson*, 104 Ala. 611; 89 N. Y. 245; 115 Wis. 447; 71 Miss. 10; 116 Mass. 401; 44 Ga. 529; 18 A. & E. Ency of Law, 220; 46 Am. Dec. 667. The property is sufficiently described in each count of the complaint.—*Hayes v. Crutchfield*, 7 Ala. 189; *Thompson v. Pearce*, 49 Ala. 210; *M. & E. R. R. Co. v. Culver*, 75 Ala. 589; *Joseph v. Henderson*, 95 Ala. 213; *Harris v. Russell*, 93 Ala. 59. The owner of property is charged with knowledge of its condition.—(*Crommelin v. Cox*, *supra*; *Lindsey v. Leighton*, 150 Mass. 285. The allegations of negligence are sufficiently specific.—*Leech v. Bush*, 57 Ala. 45; *L. & N. v. Jones*, 130 Ala. 470. The owner is bound to keep it in repair.—18 A. & E. Ency. of Law, 219; 14 L. R. A. 238; 116 Mass. 401.

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TILLMAN, GRUBB, BRADLEY & MORROW, for appellee. In the absence of an agreement between the parties the landlord is under no obligations to the tenant to keep the premises in repair.—*Buckley v. Cunningham*, 103 Ala. 452; *Bullock v. Coleman*, 136 Ala. 613; *Burkes v. Bragg*, 89 Ala. 204; 18 A. & E. Ency of Law, 215. There is no sufficient allegation of negligence.—*Johnson v. Birmingham R. L. & Co.*, 43 South. 34; *City D. Co. v. Henry*, 139 Ala. 161. The facts alleged do not import any duty upon the landlord.—*Buckley v. Cunningham*, *supra*: 18 A. & E. Ency of Law, 218-220; 33 Cal. 341; 86 Ind. 34; 139 Mich. 628; 59 Minn. 156; 29 Minn. 385; 71 Miss. 10; 101 Mo. 669; 66 W. 500; 4 Exch. 163; 19 L. J. Exch. 170.

DENSON, J.—The plaintiff rented or leased from the defendant the ground-floor rooms, of a two-story building. Water pipes ran through the building for the purpose of conveying water to and from a closet or lavatory located in the rear end of the building on the second floor. One or more of the pipes burst, and as a consequence plaintiff's goods, located in the rented rooms below, were flooded and damaged; hence this suit against the landlord. The doctrine seems to be well established, upon reason and authority, that a tenant takes leased premises in the condition in which they happen to be when leased, and that the landlord is not liable to the tenant for injuries resulting from the unsafe condition of the premises, unless he has contracted to repair or has misrepresented the premises; and this is true, whether the tenant rent the whole, or only a part, of the premises.

In *Cowen v. Sunderland*, 145 Mass. 363, 14 N. E. 117, 1 Am. St. Rep. 469, the Supreme Court of Massachusetts, after stating the rule substantially as we have stated it

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above, adds: "There is an exception to this general rule, arising from the duty which the lessor owes the lessee. This duty does not spring directly from the contract, but from the relation of the parties, and it is imposed by law. When there are concealed defects, attended with damage to an occupant, and which a careful examination would not discover, known to the lessor, the latter is bound to reveal them, in order that the lessee may guard against them. While the failure to reveal such facts may not be actual fraud or misrepresentation, it is such negligence as may lay the foundation of an action against the lessor, if injury occurs." The Supreme Court of Missouri, in *Ward v. Fagin*, 101 Mo. 669, 14 S. W. 738, 10 L. R. A. 147, 20 Am. St. Rep. 650, makes this succinct statement of the rule of liability of the landlord or lessor: "Aside from an express covenant to that effect, the landlord is not bound to keep the leased premises in repair, nor is he responsible in damages to his tenant for injuries resulting to the latter from the non-repair of the leased premises. In the absence of contractual obligation, the landlord, as regards his tenant, is only liable for acts of misfeasance, but not of non-feasance."—*Hamilton v. Feary*, 8 Ind. App. 615, 35 N. E. 48, 52 Am. St. Rep. 485, 492. The decisions of the New York courts are to the same effect. Thus in *Franklin v. Brown*, 118 N. Y. 110, 23 N. E. 126, 6 L. R. A. 770, 16 Am. St. Rep. 744, 746, it is said: "It is uniformly held in this state that the lessee of real property must run the risk of its condition, unless he has an express agreement with lessor covering that subject. The tenant hires at his peril, and a rule similar to that of 'caveat emptor' applies, and throws on the lessee the responsibility of examining as to the existence of defects in the premises, and of avoiding against their ill effects." Again in *O'Brien v. Capwell*, 59 Barb. (N. Y.) 504, it was said:

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"As between landlord and tenant, where there is no fraud, false representations, or deceit, and in the absence of an express warranty or covenant to repair, there is no implied covenant that the demised premises are suitable or fit for occupation, or for the particular use which the tenant intends to make of them, or that they are in a safe condition for use."—*Murray v. Albertson*, 50 N. J. Law, 167, 13 Atl. 394, 7 Am. St. Rep. 787; *Jones v. Millsaps*, 71 Miss. 10, 14 South. 440, 23 L. R. A. 155. Authorities to the same effect, from other jurisdictions, could be cited ad infinitum.

But we come to the decisions of our own court.—*Burks v. Bragg*, 89 Ala. 204, 7 South. 156, was an action against a tenant for rent due. The defendant pleaded set-off and recoupment, claiming damages on account of injury to his goods, during the lease term, caused by defects in the roof and gutters of the rented house, and plaintiff's failure to make repairs. Speaking to the substantive law of the case, this court said: "No duty devolved upon the landlord to make any repairs on the premises, unless there was an agreement to make them. The tenant would take the storehouse at his own risk, as to fitness for habitation or use, whatever its condition may have been at the time." The same principle is enunciated in *Bullock, etc., Co. v. Coleman*, 136 Ala. 610, 613, 33 South. 884. The case of *Buckley v. Cunningham*, 103 Ala. 449, 15 South. 826, 49 Am. St. Rep. 42, was an action by a tenant against his landlord to recover damages resulting from the bursting of a water pipe. The upper story of the building was unoccupied, and was under the exclusive control of the landlord. The negligence averred was "that the defendant negligently failed to provide a shut-off for said water pipe, so that the water in said pipe could be shut off." The defenses were not guilty, and contributory negligence. After deciding that there

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was no evidence to show that defendant's fault, if such it was, proximately contributed to plaintiff's injury, the court, speaking through Coleman, J., said: "Moreover, we are of opinion that every man has a perfect right, in the matter of water pipes or other conveniences, to construct his own buildings according to his own preference, either with or without them. There being no latent defects, or fraud or concealment, a tenant takes a building as it is, regulating the price according to the value, increased or diminished by its condition and conveniences. If the building or room has a water pipe through it, and there is no stop or waste cock, the tenant knows it when he rents the building, fixes its rental value accordingly, and, unless it is provided otherwise by contract, he assumes the risk incident to its condition." Several authorities are cited to support the proposition, amongst them being the case of *Cowen v. Sunderland*, from which we have quoted above.

In the light of the principles above adverted to, we experience no difficulty in reaching the conclusion that the demurrer to original counts 1, 2, and 3. was properly sustained. Each of the counts fails to show any covenant to make repairs, or agreement in respect to the condition of the building. Nor is misfeasance on the part of the landlord alleged; the gravaman of the counts being negligence of the landlord, in that the water pipes were defective and unsound. Neither of them shows a breach of any duty owing by the defendant to the plaintiff.

The record contains three separate amendments to the complaint, filed on January 3, 1906. The first of the amendments appears on page 4 of the record, and is an amendment only to count 1. If the amendment makes any material change in count 1, it does not appear from

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the count as amended, except by the conclusion of the pleader, that defendant owed plaintiff any duty.

The amendment which appears on page 5 of the record purports to amend count 2. If this amendment makes any material change in the count, still the averments which have been heretofore condemned as insufficient are left in the count. Furthermore, the averments are scarcely sufficient to show duty on the part of the defendant to repair. For aught that appears on the face of the count after the amendment, the pipes were defective at the time the contract of rental was made, and the plaintiff knew it, or made no effort to ascertain the condition of the premises.—*Anderson v. Oppenheimer*, L. R. 5 Q. B. Div. 602, 49 L. J. Q. B. 708. Moreover, "charge and control," as these words are used in the count, may refer only to the time the plaintiff rented from the defendant. The count is susceptible of this construction, and it must be adopted as against the pleader. In this view it fails to show any duty.

The third amendment is on page 6 of the record, and purports to be an additional count, designated count 4. Granting that this count is good in all other respects, it proceeds upon the theory of failure to keep in repair a portion of the building not rented to the defendant. In other words, negligence is the gravamen of the count, and the negligence averred is in the use of weak and defective pipes. To put the lessor in default in this respect, pretermittting all other considerations, it is necessary to aver knowledge or notice on her part of such defect. This the count fails to do, and it was therefore open to the sixth ground of the demurrer.

The fifth count of the complaint is subject to the same criticism.—*Angevine v. Knox-Goodrich* (Cal.) 31 Pac. 529, 18 L. R. A. 264; *Thompson v. Clemens*, 96 Md. 196,

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53 Atl. 919, 60 L. R. A. 580; *Bowe v. Hunking*, 135 Mass. 380, 46 Am. Rep. 471.

It is only necessary, in disposing of count 7, to say it is rendered unintelligible by its reference to count 1. It may be that count 1 was inadvertently inserted, instead of count 5; but we have no authority to change the plain writing and language of the record and must treat it as we find it.

Count 6 is an attempt to fasten liability upon the defendant by the application to the owner, occupant, or person in control of the upper story of the building of the maxim, "Sic utere tuo ut alienum non lædas." While from the language of the count it may not be clear what the relationship existing between plaintiff and defendant was, whether that of tenant and landlord, or of distinct ownership, yet, in the application of the maxim, this is deemed immaterial.—2 Wait's Actions & Def. 745; *Krueger v. Ferrant*, 29 Minn. 385, 13 N. W. 158, 43 Am. Rep. 223, 225. "This maxim restrains a man from using his own to the prejudice of his neighbor, but is not usually applicable to a mere omission to act, but rather to some affirmative act or course of conduct which amounts to or results in an invasion of another's rights."—*Kruger v. Ferrant, supra*, and cases there cited. It is clear that the count claims nothing, and makes no allegation, in respect to affirmative conduct on the part of the defendant. It simply avers notice of the defective condition of the pipes, and omission to repair same before they burst. It does not present a case of maintenance of a nuisance and consequent injuries to defendant's neighbor. So far as the averments go, the pipes when placed in the building, were perfectly sound and reasonably suitable for the purposes to which they were put; and though they had become defective, and the defendant had had notice, still the count does not show

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notice of the defects in time to enable defendant, before the breakage occurred, to make the necessary repairs.

If the relation of the parties (in respect to the part of the premises occupied by the plaintiff) should be construed as being that of landlord and tenant, there is in the count no averment of any covenant or agreement on the part of the landlord to make repairs; and we have seen that there is no implied agreement to make repairs, nor that the premises are or will be suitable for the tenant's use or business. It is plaintiff's theory, however, that where the landlord leases only a part of the premises, and retains the remainder under his control, he is liable to the tenant for damages which may flow from failure to repair. This principle was recognized and enforced in the case of *Toole v. Beckett*, 67 Me. 544, 24 Am. Rep. 54. That decision has been adversely criticised by more than one court of final resort, and its fallacies have been pointed out. In *Jones v. Millsaps*, 71 Miss. 10, 14 South. 440, 23 L. R. A. 155, 158, the Supreme Court of Mississippi, criticising *Toole v. Beckett*, said: "The decision and its reasoning are not satisfactory, and the vice of the opinion is that it confounds the passivity of the landlord with affirmative action on his part amounting to negligence." Other decisions which were relied upon as supporting or following *Toole v. Beckett* were referred to by the court and it was pointed out that they distinguished themselves from that case, in that they presented cases of negligence in affirmative action on the part of the landlord. It was then said by the Mississippi court: "If the weight of authority is controlling, it will be ascertained, an examination, that the current is against liability of the landlord." Many cases are cited by the court. The Supreme Court of Minnesota, in the case of *Krueger v. Ferrant*, repudiated the theory of the plaintiff now under consideration, and declined to fol-

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low *Toole v. Beckett*, *supra*.—29 Minn. 385, 13 N. W. 158, 43 Am. Rep. 223; *Ward v. Fagin*, 101 Mo. 669, 14 S. W. 738, 10 L. R. A. 147, 20 Am. St. Rep. 650, 654.

It seems, upon reason and the weight of authority, that in the absence of a covenant to repair, or of fraud or deceit, the lessor can be made liable for damages on account of defects only in cases of misfeasance, or of active interference on his part, or where he maintains a nuisance on the premises, and that no liability attaches for mere non-interference, even though the landlord remain in the occupancy of a part of the premises. The demurrer to the sixth count was properly sustained.—Authorities *supra*; *Buckley v. Cunningham*, 103 Ala. 449, 453, 15 South. 826, 49 Am. St. Rep. 42; *Doupe v. Genin*, 45 N. Y. 119, 6 Am. Rep. 47; *Ward v. Fagin*, 101 Mo. 669, 14 S. W. 738, 10 L. R. A. 147, 20 Am. St. Rep. 650, 653; 6 Am. Law. Review, 614; *Purcell v. English*, 86 Ind. 34, 44 Am. Rep. 225.

Chief Justice TYSON and Justice ANDERSON concur in the opinion and conclusions, while Justices DOWDELL, SIMPSON, McCLELLAN, and MAYFIELD concur therein, save as to the sixth count of the complaint, entertaining the opinion that this count is not subject to the demurrer, and that the court committed reversible error in sustaining the demurrer thereto. Therefore, in accordance with the views of the majority, the judgment of the trial court, for the error committed in sustaining the demurrer to the sixth count, must be reversed, and the cause remanded.

Reversed and remanded.

[Reach v. Quinn.]

Reach v. Quinn.*Malicious Prosecution.*

(Decided Jan. 19, 1909. 48 South. 540.)

1. *Appeal and Error; Record; Questions Presented; Demurrer.*—Where the record fails to disclose what the amendment to a complaint was, and the minute entry recites that the demurrer was sustained to the count as amended, the court's action relative to the demurrer to the amended count cannot be reviewed.

2. *Malicious Prosecution; Complaint; Sufficiency.*—A count in malicious prosecution should aver the issuance of process; so a count averring only that the defendant maliciously and without probable cause therefor made an affidavit against the plaintiff charging him with refusing or failing to work the public road, and as a proximate consequence thereof plaintiff was arrested, and required to give bond, and that the charge had been judicially investigated and plaintiff discharged is insufficient. And the count is insufficient as a count in trespass for false imprisonment, because it fails to aver that the defendant arrested and imprisoned plaintiff or caused it to be done.

3. *Warrants of Arrest; Signature; Validity.*—A warrant of arrest issued by a justice of the peace, but not signed by him officially or with the initials of his office, and the official character of the signature nowhere appearing thereon, is invalid, although it is signed by the individual who is the justice. (Sec. 5208, Code 1896.)

4. *Evidence; Judicial Notice; Justices of the Peace.*—While the court takes judicial notice of who are the justices of the peace, yet the court cannot judicially know that there are not others of the same name, and hence cannot judicially know that the signature is that of the Justice of the peace issuing process, where the same is signed, individually, and without insignia of office of any kind.

5. *Same; Parol Evidence; Adding to Terms of Writing.*—A warrant of arrest can not be aided as to its validity by parol evidence to show that the person who signed it was a Justice of the Peace; warrants should be valid on their face to authorize their execution.

APPEAL from Bibb Circuit Court.

Heard before Hon. B. M. MILLER.

Action by W. L. Reach against Oliver J. Quinn.
From the judgment, both parties appeal. Affirmed.

The fifth count was as follows: "Plaintiff claims of defendant said sum of \$500 as damages, for that said defendant maliciously and without probable cause therefor

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made an affidavit against plaintiff on a charge of refusing to work the public road, and as the proximate result of the making of such affidavit the plaintiff was arrested, as the defendant intended he should be, and required to give bond for his appearance for trial upon said charge before J. W. Jones, justice of the peace of beat 11, Bibb county, Ala.; and plaintiff avers that such charge had been judicially investigated and determined, and plaintiff herein discharged. And plaintiff avers that by reason of such prosecution the plaintiff lost one day's work, of the reasonable value of \$6, for which he specially sues." The demurrers raised the question decided in the opinion.

LAVENDER & THOMPSON, for appellant. The counts were each in trespass for false imprisonment, and the demurrers were improperly sustained thereto.—8 Ency P. & P. 845; *Rich v. McNery*, 103 Ala. 345; *Clifton v. Grayson*, 2 Stew. 412. Count 5 was good as a count for false imprisonment.—*Field v. Ireland*, 21 Ala. 240; *Davis v. Sanders*, 133 Ala. 275. There was no departure.—*O'Neal v. McKenna*, 116 Ala. 608. Technical accuracy is not required in proceedings before a justice of the peace, and it cannot be said that the official capacity does not in some way appear from this warrant.—*Hyde v. Adams*, 80 Ala. 111; *Watts v. Womack*, 44 Ala. 605; *Albritton v. Williams*, 32 Ala. 647; *McCartney v. Branch Bank*, 3 Ala. 709. The court takes judicial knowledge of the officers of the state, and their signature.—*Whitney v. Jasper L. Co.*, 119 Ala. 497; *Carey v. The State*, 76 Ala. 78; *Sandlin v. Anderson*, 76 Ala. 405; *Coleman v. The State*, 63 Ala. 93. The warrant was sufficient.—*Brown v. The State*, 63 Ala. 97.

DANIEL COLLIER, and JOHN T. ELLISON, for appellee. The counts were in case for malicious prosecution.—

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Davis v. Sanders, 133 Ala. 278; *Southern C. Co. v. Adams*, 121 Ala. 157; 97 Ala. 626. They were, therefore, wanting in material averments.—*McLeod v. McLeod*, 75 Ala. 483; *Foster v. Napier*, 73 Ala. 595; 73 Ala. 42; *Shepherd v. Furniss*, 19 Ala. 760. There was no error in excluding the warrant.—*Oates v. Bullock*, 136 Ala. 546; *Chambliss v. Blair*, 127 Ala. 86. All presumptions are indulged in favor of the ruling of the trial court.—105 Ala. 201; 114 Ala. 131; 101 Ala. 265. The bill of exceptions should be stricken.—*Beale v. The State*, 99 Ala. 234.

DOWDELL, J.—The first assignment of error goes to the ruling of the court below in sustaining a demurrer to the fourth count as amended. The minute entry recites that the demurrer to the fourth count as amended is sustained, but it nowhere appears from the record in what the amendment to the fourth count consisted. In this state of the record, not knowing in what the amendment consisted, we cannot review the court's action.

The fifth count, whether intended as a count in case for a malicious prosecution or as a count in trespass for false imprisonment, was in either aspect faulty, and subject to the demurrer interposed. As a count in case for malicious prosecution, it is faulty in omitting to aver the issuance of process.—*Davis v. Sanders*, 133 Ala. 275, 32 South. 499, and authorities there cited. As a count in trespass for false imprisonment, it fails to aver that the defendant was arrested and imprisoned, or caused to be arrested and imprisoned, the plaintiff. Manifestly it was intended by the pleader as a count in case for malicious prosecution, since it contains all of the necessary averments of such a complaint (form 20, Code 1896, p. 947, c. 91), except the averment of the issuance of the warrant.

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There was no error in excluding the warrant offered in evidence. Section 5208 of the Criminal Code of 1896, in reference to warrants, provides, among other things: "And the warrant must be signed by the magistrate, with his name and initials of office, or the same must in some way appear from the warrant." The statute in the latter clause of the foregoing extract seems to emphasize the requirement as to the signature of the officer and the initials of his office appearing on the warrant in order to give it validity. The warrant offered in evidence was signed by "J. W. Jones" as an individual, and not in any official character, or with the initials of his office, and this nowhere appeared on the warrant. It is no answer in such case to say that the courts judicially know who are justices of the peace. This would be true if J. W. Jones had signed the warrant in his official character, by designating himself as such officer by the initials of his office, or letting that fact somewhere appear on the warrant. We cannot judicially know that there is but one J. W. Jones, and hence when J. W. Jones signs a paper as an individual, without more, we cannot judicially know that he is a particular officer. We do not think that the paper can be aided as to its validity by parol evidence of the fact that the J. W. Jones who signed it was a justice of the peace. The warrant should be valid on its face to justify the officer in executing it. In this connection, see *Oates v. Bullock*, 136 Ala. 537, 33 South. 835, 96 Am. St. Rep. 38.

We find no reversible error in the record, and the judgment appealed from will be affirmed.

Affirmed.

SIMPSON, ANDERSON, and McCLELLAN, JJ., concur.

[McDaniel v. Cain.]

McDaniel v. Cain.

Malicious Prosecution and False Imprisonment.

(Decided Nov. 19, 1908. 48 South. 52. Rehearing denied Dec. 24, 1908.)

1. *Affidavit. Disposing of Property on Which Another Has a Lien.*—An affidavit charging that affiant had probable cause for believing and did believe that within ten months before the filing of an affidavit, the defendant (plaintiff here) removed and sold or disposed of lint cotton to hinder and defraud affiant, on which affiant held a landlord's lien for advances during the year 1906, with the knowledge of the existence thereof, which offense had been committed within the county, etc., is not void.

2. *False Imprisonment; Pleas.*—Pleas, to a false imprisonment count in the complaint, which set out the affidavit and the warrant, are not demurrable as for a failure to show that plaintiff was arrested for what was legally a criminal offense on a valid warrant, or because the affidavit attempted to charge an offense in the alternative.

3. *Affidavit; Defects.*—Where an affidavit designated the offense according to the statutory caption the fact that an indictment similar to the affidavit would not have been good against demurrer, does not render the affidavit void.

4. *Appeal and Error; Harmless Error; Ruling on Pleading.*—Where plaintiff was under the necessity of proving the averments attacked by demurrer in order to establish a prima facie case, which he did without dispute, it was harmless error to sustain a demurrer to such complaint.

5. *Same.*—If not entitled to recover on the merits plaintiff could not recover for counsel fees, and where plaintiff was properly disallowed any recovery, the sustaining of a demurrer to the complaint so far as it sought to recover counsel fees was harmless.

6. *Landlord and Tenant; Lien; Who Entitled.*—A mere rental agent of the owner of the land is not entitled to a lien on the crops for advances made to a tenant.

7. *Malicious Prosecution; Wrongful Prosecution.*—Where defendant did not have a landlord's lien against plaintiff for advances made, a prosecution against plaintiff by the defendant for an alleged wrongful sale of the crop to the prejudice of defendant's lien, was wrongful.

8. *Same; Malice; Question of Fact.*—Where defendant advanced certain moneys to plaintiff and believed that he had a lien on the crop therefor, and instituted a prosecution against the plaintiff for the alleged wrongful sale of the crop to the prejudice of his lien,

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whether or not he was actuated by malice in so doing, was a question of fact to be determined by the court sitting without a jury.

APPEAL from Morgan Circuit Court.

Heard before Hon. D. W. SPEAKE.

Action by Frank McDaniel against James F. Cain for malicious prosecution and false imprisonment. From a judgment for defendant, plaintiff appeals. Affirmed.

The complaint was in the following language: "(1) Plaintiff claims of defendant \$500 damages for maliciously and without probable cause therefor causing plaintiff to be arrested under a warrant issued by J. C. Hogan, a justice of the peace, on the 14th day of December, 1906, on a charge of removing and selling or disposing of lint cotton for the purpose of hindering, delaying, or defrauding said Cain, on which said Cain held a landlord's lien for advances made to said McDaniel during the year 1906, with the knowledge of the existence of said lien, which charge, before the commencement of this action, has been judicially investigated and said prosecution ended and plaintiff discharged. (2) Plaintiff claims of defendant \$500 damages for causing plaintiff to be arrested and imprisoned without probable cause therefor (and then follows the charge as set out in count 1.) (3) Plaintiff claims of defendant the like sum of \$500 damages for unlawfully causing plaintiff to be arrested against the will of plaintiff (here follows the description of the cause of arrest as set out in count (1) for one day or part thereof, to wit, on December 14, 1906. And plaintiff alleges that, by reason of said arrest and deprivation of his liberty, plaintiff incurred a liability of \$50 in the employment of an attorney, and said \$50 is claimed as special damages; that plaintiff was by reason of said arrest compelled to attend court and lost the fruits of his labor for one day, which he claims as special damages; that by reason of said charge made against him,

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and said arrest, plaintiff was injured in his good name, suffered humiliation and mental pain." (4) Same as 1, with special damages alleged in count 3 added. (5) Same as 2, with special damages alleged in count 3 added. This complaint was amended by adding to each count thereof the following: "That said prosecution and proceedings were had before the said J. C. Hogan, who was the justice of the peace at the time in and for precinct No. 10, Morgan county, Ala." Counts 1 and 2 were amended by adding to each of the counts the special damages claimed in count 3. Counts 3 and 4 were amended by adding the following: "That plaintiff procured an attorney at law to defend him against said charge, for which he incurred a liability for a reasonable attorney's fee, which is alleged to be \$50, as hereinabove set out."

The general issue was interposed to all of these counts. To counts 2, 3, and 5, separately and severally, the following pleas were interposed: "That on the 11th day of December, 1906, defendant made before J. C. Hogan, justice of the peace, in Morgan county, Ala., an affidavit in substance and effect as follows (omitting the caption): 'Before me, J. C. Hogan, a justice of the peace in and for said county, in said state, this day personally appeared James F. Cain, and made oath that he had probable cause for believing and does believe that within 12 months before the filing of this complaint that one Frank McDaniel did remove and sell or dispose of lint cotton for the purpose of hindering, delaying, or defrauding affiant, on which affiant held a landlord's lien for advances made to said Frank McDaniel during the year 1906, with the knowledge of the existence thereof, which said offense has been committed in said county, against the peace and dignity of the state of Alabama.' Signed and sworn to, etc. Upon which affidavit the said

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J. C. Hogan issued the following writ (omitting the caption): "To Any Lawful Officer of the State of Alabama: Complaint on oath having been made before me that the offense of removing and selling cotton on which another held a landlord's lien has been committed, and accusing Frank McDaniel thereof, you are therefore commanded forthwith to arrest Frank McDaniel and bring him before me. Dated the 11th day of December, 1906. J. C. Hogan, J. P." Upon which warrant the plaintiff was taken and retained in custody by W. A. Culver, constable; his bail being fixed at \$300." Plea 3 was a duplicate of plea 2.

Demurrers were interposed to pleas 2 and 3, because "it is not shown that plaintiff was arrested for what is legally a criminal offense upon valid process. (2) The affidavit is void, in this: It attempts to charge the commission of an offense in the alternative, and each alternative does not charge an indictable offense. (3) Disposing of lint cotton for the purpose of hindering, delaying or defrauding a person who holds a landlord's lien thereon, with the knowledge of the existence thereof, as alleged in said affidavit, is not a violation of the statute, and is not a criminal offense. (4) Said affidavit is void, for that it charges the plaintiff, McDaniel, with removing and selling or disposing of the property therein mentioned, and the alleged disposing of said property as therein alleged does not constitute a criminal charge. (5) It is not shown that said prosecution was what is legally a criminal offense upon valid process. (6) Said writ of arrest is void in this: The offense therein set forth does not aver or show the commission of a criminal offense," etc.

S. A. LYNNE, for appellant. Neither of the counts were subject to the demurrers interposed.—*O'Neal v. Mc-*

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Kenna, 116 Ala. 616; *Ex parte Harris*, 52 Ala. 94; *Raglanrd, et al. v. Wynn*, 37 Ala. 35. Plea No. 2 of justification was insufficient and demurrer to it should have been sustained.—*Hornsby v. The State*, 94 Ala. 55; *Johnson v. The State*, 32 Ala. 583; *Rayford v. The State*, 7 Port. 101; *Burden v. The State*, 25 Ala. 60; 12 Cyc. 290. Demurrer to plea 3 should have been sustained.—*Ellison v. The State*, 69 Ala. 4; *Cobb v. The State*, 100 Ala. 21; *Norris, et al. v. The State*, 50 Ala. 126. On the above authority the amended plea 3 was subject to the demurrers interposed. The court erred in the judgment rendered.—*Gerson v. Norman*, 111 Ala. 423.

E. W. GODBEE, for appellee. The intent need not have been alleged in the affidavit.—*Williams v. The State*, 88 Ala. 84. Defects may be supplied by inference.—*Crosby v. Hawthorne*, 25 Ala. 223. Omissions are not fatal.—*Johnson v. The State*, 73 Ala. 23. Neither value nor ownership need be alleged.—*Williams' Case, supra*; *Bradford v. The State*, 134 Ala. 141; *Adams v. Coe*, 26 South. 653; *Ewing v. Samford*, 19 Ala. 611; *Heard v. Harris*, 68 Ala. 45; *Field v. Ireland*, 21 Ala. 240; *Rhodes v. King*, 52 Ala. 273; *Kellar v. The State*, 123 Ala. 94; *Gandy v. The State*, 81 Ala. 71. On the above authorities, the particulars requisite to an indictment are not necessary in an affidavit. Designation according to common parlance or designation according to the name given in the books is sufficient.—*Authorities supra*; *Campbell v. The State*, 43 South. 743. The facts show no false imprisonment. Counsel discusses the other assignments of error, but without citations of authority. He insists that attorney's fees are not recoverable and cites.—*Love-man v. Bir R. L. & P. Co.*, 43 South. 416. Counsel further insist that plaintiff is not entitled to recover in any event.—*Bullock Co. v. Coleman*, 136 Ala. 610; *Cross v. Eslinger*, 133 Ala. 409.

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ANDERSON, J.—The affidavit, as set out in the pleas, both before and after amendment, was not void, and said pleas were not subject to the demurrer interposed, as they related only to the false imprisonment counts of the complaint. The affidavit designated the offense as per the statutory caption, and was not void. The fact that an indictment similar to said affidavit would not be good against a demurrer did not render the said affidavit void.

The action of the trial court in sustaining the demurrer to the original complaint was clearly innocuous to the plaintiff, as he had to prove the very averment complained of in the demurrers in order to make out a *prima facie* case, which he did without dispute.

Conceding that the court erred in sustaining the demurrer to so much of the complaint as sought to recover counsel fees, the action in this respect was innocuous as the court properly disallowed a recovery by the plaintiff. He could clearly get no attorney's fees if he did not show a right to recover anything.

It is true the testimony of Spencer, one of the owners of the land, showed that the defendant was a mere rental agent, rather than a tenant in chief, and that McDaniel was not his (Cain's) tenant, and he therefore had no lien on the crops for said \$20.24 advanced. There was also a judgment, from which the defendant took no appeal, adjudging that the cotton raised on the land was not subject to a landlord's lien in favor of the defendant, Cain. This being true, the prosecution was wrongful, yet it was a question of fact as to whether or not it was maliciously instituted.—*Goldstein v. Drysdale*, 148 Ala. 42 South. 744; *Alsop v. Lidden*, 130 Ala. 548, 30 South. 401. The trial court, sitting as a jury, could well infer from the evidence that the prosecution was not malicious. It was not disputed that the defend-

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ant advanced the sum claimed, and it is evident that he thought he had a lien on the crop. It is true that ignorance of the law excuses no man for crime, or for an ordinary civil wrong; but in a civil action for malicious prosecution an honest belief in the existence of a right, though it does not in fact exist, may purge the prosecution of malice and defeat a recovery. The existence of malice being a question of fact, we are not prepared to hold that the court, sitting as a jury, erred in the conclusion reached.

The judgment of the circuit court is affirmed.

Affirmed.

TYSON, C. J., and DOWDELL and McCLELLAN, JJ., concur.

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Malicious Prosecution and False Imprisonment.

(Decided Feb. 18, 1909. Rehearing denied April 6, 1909.
49 South. 69.)

1. *False Imprisonment; Grounds.*—Where a person is arrested under a warrant valid on its face based upon a complaint, sufficiently designating the offense, and issued by a justice of the peace, having jurisdiction of the offense tried, such person cannot maintain an action for false imprisonment.

2. *Evidence; Motive or Intention; Competency.*—Where the superintendent of the defendant testified that he swore out the warrant on his own responsibility, such testimony related to the capacity in which he acted, and not to his intention or motive, and was consequently admissible.

3. *Same; Res Gestae.*—Where, in a conversation between the superintendent of the defendant and an attorney, relative to the swearing out of a warrant for the arrest of the plaintiff, the statement made in such conversation by the superintendent that the defendant did not want the plaintiff arrested, was admissible as a part of the res gestae, especially in view of the fact that the superintendent is then seeking legal advice as to arresting the plaintiff, although without this the latter statement would not have been admissible by itself.

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4. *Malicious Prosecution; Evidence.*—Where the warrant upon which plaintiff was arrested was sworn out by the superintendent of the defendant, the duty is upon the plaintiff to show to the reasonable satisfaction of the jury that the affidavit upon which the warrant is issued was made by defendant's authority, and hence, it was error to charge that that fact must be shown to the satisfaction of the jury.

5. *Same; Liability of Corporation; Authority of Agency to Institute.*—Independent of his inherent powers and duties, a superintendent must have had authority to swear out a warrant in order to render his corporation liable for his acts in doing so.

6. *Same; Misleading Instructions.*—Where the warrant for plaintiff's arrest was sworn out by a superintendent of the defendant, a charge instructing a finding for defendant if the affidavit upon which the warrant is based, was made without defendant's authority, is misleading, since independent of the authority resulting from the superintendent's duties, the authority to swear out the warrant was essential to render the defendant liable; yet, such charge will not cause a reversal as the duty was upon the other party to ask charges explanatory thereof.

7. *Same; Malice; Evidence.*—Malice cannot be implied in the institution of a prosecution when it was done in the exercise of a legal right.

8. *Charge of Court; Assuming Fact.*—A charge asserting that if plaintiff remained in the defendant's house after his term had expired defendant could sue to recover the house, did not assume any fact.

(Anderson and McClellan, JJ., dissent in part.)

APPEAL from Madison Circuit Court.

Heard before Hon. D. W. SPEAKE.

Action by J. A. Emerson against the Lowe Manufacturing Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

The controverted facts sufficiently appear in the opinion of the court. At the request of the defendant, the court gave the following charges: (5) "The plaintiff must show to the satisfaction of the jury that the affidavit of Finney, upon which the warrant was issued for the arrest of the plaintiff, was made with authority of this defendant, or that the defendant thereafter ratified the action of Finney." (7) "If the jury find from the evidence that the affidavit for the arrest of the plaintiff was made without the authority of this defendant,

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the verdict should be in favor of the defendant." (10) "If the plaintiff remained in the house after his term of renting expired, the defendant had the right to bring suit for the recovery of the house, and the fact of bringing a suit for this purpose is not evidence of malice against the plaintiff.

JAMES H. BALLENTYNE, for appellant. The court erred in allowing Finney to testify that he swore out the warrant against Emerson on his own responsibility.—*Southern Express Co. v. Couch*, 133 Ala. 288; 1 A. & E. Ency of Law, 990; *Southern C. & F. Co. v. Adams*, 131 Ala. 160. The court erred in giving charge 5 requested by defendant.—*Southern C. & F. Co. v. Adams*, *supra*; *Southern Express Co. v. Couch*, *supra*; 46 N. Y. 24; *U. S. F. & G. Co. v. Charles*, 131 Ala. 662; *Moore v. Heineke*, 119 Ala. 640; *L. & N. v. Sullivan T. Co.*, 126 Ala. 103; *Torrey v. Berney*, 113 Ala. 504; *Rowe v. Barber*, 93 Ala. 426. Charge 7 should not have been given.—*B. R. L. & P. Co. v. Mullin*, 138 Ala. 614; *Wellman v. Jones*, 124 Ala. 558. The giving of charge 10 was error, *Wellman v. Jones*, *supra*; *National Surety Co. v. Mabry*, 139 Ala. 217.

LAWRENCE COOPER, and GEORGE P. COOPER, for appellee. Malicious prosecution will not lie since the affidavit charges no offense.—*Chambliss v. Blair*, 127 Ala. 86. The warrant was regular on its face, issued by proper authority, and the arrest was by an officer charged with that duty, hence false imprisonment will not lie.—*Leib v. Shelby I. Co.*, 97 Ala. 626; *Rhodes v. King*, 52 Ala. 272. There was probable cause for believing appellant guilty.—*Lunsford v. Dietrich*, 93 Ala. 565. Prosecution was advised by competent counsel upon full statement of the facts.—*McLeod v. McLeod*, 73 Ala. 42;

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Motes v. Bates, 80 Ala. 382; *Shannon v. Sims*, 146 Ala. 673; *O'Neal v. McKenna*, 116 Ala. 606. Counsel discuss other assignments of error, but without citation of authority.

McCLELLAN, J.—Action for damages for false imprisonment and for malicious prosecution by appellant against appellee. The general affirmative charge for the defendant might well have been given upon the counts for false imprisonment. The undisputed evidence shows that the warrant, under the command of which plaintiff was arrested by an officer, was valid on its face, was issued by a justice of the peace having jurisdiction of the case and of the offense imputed, and upon a complaint (the original) sufficiently designating the offense created by Code 1896, § 4757 (Code 1907, § 7342), as such designation is permitted, in prosecutions before justices, by Code 1896, § 4000 (Code 1907, § 6703). *Lieb v. Shelby Iron Co.*, 97 Ala. 626, 12 South. 67. We therefore treat the appeal without reference to the counts for false imprisonment.

The prosecution was commenced by C. D. Finney. Finney, some of the testimony tended to show, was the superintendent of the defendant and as such had the general authority and power of the defendant to rent its cottages and lands or lots and to collect the rents therefore. At the same time the affidavit charging plaintiff with a violation of Code 1896, § 4757, was sworn out by said Finney, he also made, as superintendent of the defendant, an affidavit to induce the issuance by the justice of the peace of a writ of attachment for the purpose of collecting the rent alleged to be due from plaintiff to the defendant company. The defendant insisted that Finney's act in instituting the prosecution was the result of his own motion and individual purpose, and in-

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dependent of his relation to defendant; and the plaintiff insisted that Finney's act was in the line and scope of his authority as superintendent, and was so taken, and hence was the defendant's act. Upon this vital issue, to be determined by the jury as the facts and circumstances appear from this record, Finney as a witness made the statement that "he swore out the warrant against Emerson on his own responsibility." The motion of the plaintiff to exclude the statement, because illegal, was overruled, and exception was reserved. This action of the court was error. The statement was of the essence of the issue to be decided by the jury. It was not only a conclusion of the witness, but was also the announcement, as evidence, of the secret motive or intention that inspired his act in the premises. All of the justices, except Justice ANDERSON, who agrees with the writer on this point, are of the opinion that this statement was one relating to the capacity in which the witness acted, and not his intention or motive, and was admissible. What took place, in the conversation between Finney and Solicitor Taylor, with reference to the swearing out of the warrant by Finney against plaintiff, was of the *res gestæ* of that act, and was properly admitted. While, if taken alone, the alleged fact that the mill did not want Emerson arrested would not have been admissible, yet, under the rule referred to, was, especially in the aspect that legal advice in the premises was then being sought.

Charge 5, given at the request of the defendant, was erroneous, since it required the jury to be satisfied of the hypothesized fact; whereas the legal condition to a recovery by plaintiff was that the jury should have been reasonably satisfied.—*Moore v. Heincke*, 119 Ala. 627, 640, 24 South. 374. The charge is probably subject to other criticisms.

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Charge 7, given at the request of the defendant, might well have been refused, because calculated to mislead the jury, in that authority, aside from that inhering (if so) in the powers and duties conferred on Finney by the defendant, was essential to render the defendant liable for Finney's act in the premises. However the giving of the charge, merely calculated to mislead, was not error. The plaintiff should have asked an explanatory charge.

There was no error in giving charge 10, requested by the defendant. It did not assume any fact, but hypothesized only the remaining of Emerson in the house after his term of renting had expired. The exercise of a legal right can never afford ground for the imputation of malice.

There is no merit in the other errors assigned. The alleged effort of the plaintiff to pay the claim for rent, as now appears, was rent for the "house," and not rent of the "land."

For the errors indicated, the judgment is reversed, and the cause is remanded.

Reversed and remanded.

DOWDELL, C. J., and SIMPSON, DENSON, MAYFIELD, and SAYRE, JJ., concur.

ANDERSON, and McCLELLAN, JJ., dissent in part.

[Johnson v. Turner.]

Johnson v. Turner.*Libel and Slander.*

(Decided Nov. 19, 1908. 47 South. 570.)

1. *Libel and Slander; Construction of Language Used.*—In construing or interpreting alleged defamatory language, the whole expression must be considered in the light of the common acceptation of the terms employed, as they are colored, emphasized or qualified by the context.

2. *Words and Phrases; "Misappropriation."*—Although the word "misappropriation" is susceptible of the meaning of dishonesty, embracing embezzlement, yet when considered alone the word does not, in all cases, necessarily mean dishonesty.

3. *Libel and Slander; Actionable Words; Imputing Moral Turpitude.*—Words spoken of a person that he had destroyed a docket or public record belonging to the mayor's office to cover up evidence of his misappropriation of public funds and fines belonging to the town were defamatory per se as imputing moral turpitude.

4. *Pleading; Objections to Complaint; Mode.*—Demurrer only lies to raise the question as to whether or not elements of damages claimed, are sufficiently and definitely enough laid; not as to whether they are recoverable; so objection thereto should be taken by motion to strike, objecting to evidence or requested instructions.

APPEAL from Birmingham City Court.**Heard before Hon. C. C. NESMITH.**

Action for slander by J. A. Turner against R. E. Johnston. Judgment for plaintiff, and defendant appeals. Affirmed.

ALLEN & FORT, for appellant. The court erred in overruling demurrers to the 3rd count as originally filed and as amended.—20 A. & E. Ency of Law, 799; *Gaither v. Advertiser Co.*, 102 Ala. 463. Plaintiff in a slander or libel action is not entitled to recover damages for bodily suffering.—*Dixon v. Smith*, H. & N. 450; *Herrick v. Latham*, 10 John 281; *Beech v. Reine*, 2 Hill. 301; *Wilson v. Goit*, 70 N. Y. 443; *Adams v. Smith*, 58 Ill. 421;

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Butler v. Hoboken, 2 Atl. 272; 25 Cyc. 534; 18 A. & E. Ency of Law, 888. Counsel discuss the assignments of error relative to the exceptions as to evidence but cite in support of their contention no authority.

R. J. WHEELER, and ARTHUR L. BROWN, for appellee. The declaration made in the complaint was actionable. —*Gaither v. Adv. Co.*, 102 Ala. 463; *Wofford v. Mecks*, 129 Ala. 349. Counsel discuss other assignments of error, but without citation of authority.

McCLELLAN, J.—The third count, as originally filed, is as follows: "Plaintiff claims of defendant the like sum of ten thousand dollars, damages for falsely and maliciously charging the plaintiff with the destruction of a certain book or docket or public record belonging to the office of the mayor of Adamsville, by speaking of and concerning him in the presence of divers persons, in the year 1904, in substance as follows: 'Turner has destroyed the docket in order to cover up the evidence of his misappropriation of public funds and fines belonging to the town of Adamsville.'" The appellant insists that the matter complained of is not defamatory per se, and that to render the count good against demurrer it would be necessary to aver extrinsic facts and circumstances, as well as special damages. This criticism of the count is spoken by appropriate demurrer.

The occasion does not require a general consideration of the law applicable to actionable defamation. Our previous decisions sufficiently, for the present purpose, cover that field. The sole question, on this count, is one of interpretation of the language ascribed to the defendant (appellant). To such purpose we must consider the whole expression imputed, and read the whole matter in the light of the general, common acceptance

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of the terms employed, as well, as they are colored, emphasized, or qualified by the context in which appearing. In *Wofford v. Meeks*, 129 Ala. 357, 30 South. 627, 55 L. R. A. 214, 87 Am. St. Rep. 66, is quoted, from *Peake v. Oldham*, 1 Cowp. 275, this wholesome expression: "When words from their general import appear to have been spoken with a view to defame a party, the court ought not to be industrious in putting a construction upon them different from what they bear in the common acceptation and meaning of them." Character, whether personal or in trade or profession, is too dear, and wrongful and damnifying aspersion thereof too easily accomplished, to justify the courts in reading to innocence expressions which, in the common acceptation, are defamatory. As indicated by the rule of construction in such cases, summarily stated above, we cannot determine the question presented on this matter by reference alone to the meaning of the word "misappropriation." On the contrary, that term must be taken, in meaning, in connection with its associates in expression. If, however, we adopt, for the occasion, the definition of the term pressed upon us by counsel for appellant, viz., "The wrongful conversion of or dealing with any thing by the person to whom it has been intrusted," a full answer is afforded to appellant's argument that no relation of trust on the part of Turner with respect to the "public funds and fines" of the municipality is shown by the count; and, without controlling the conclusion here, it may be conceded that, considered alone, the word does not necessarily, in all case, mean dishonesty. That it is susceptible of imputing a meaning of dishonesty, embracing embezzlement, is true.—*Hana v. DeBlaquiere*, 11 U. C. Q. B. 314; 5 Words & Phases, p. 4529. See, also, related words on the cited page.

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Ascribing to the term just discussed the most innocent of its meanings, in common acceptation, we are of the opinion that the gravamen of the charge borne by the whole expression quoted in the count is that Turner destroyed the evidence of his wrongful conversion of or dealing with the "public funds and fines" belonging to the town of Adamsville in order to cover up, with the purpose to hinder, if, indeed, not to render impossible, the detection or ascertainment of his misconduct, innocent of peculation though it was. Does this involve a charge of moral turpitude? We entertain no doubt that it does. That it imputed a species of dishonesty of a highly depraved character cannot be doubted. Whether these misappropriated funds were in his hands for public purposes or not, whether they lawfully passed to his custody or not, the public record, the docket, affording evidence of his misconduct, should have been as sacred from destruction as the public funds should have been free from criminal appropriation. In fact, to the man innocent of criminal wrong in the handling of funds the faithful preservation of the evidence of his dereliction is often the highest testimonial of his purity; whereas, the willful destruction, as was imputed to have been accomplished by Turner in the matter quoted in the count, for the purpose of shielding himself, of the evidence from which even his innocent wrong could be discovered, not only ascribes moral depravity to his conduct in his destroying act, but also has the immediate and natural tendency and effect to impute to what may have been void of criminality, dishonesty, or peculation, if only described as misappropriation of funds, a dishonesty equivalent to embazlement or larceny, for the reason that invariably the ordinary mind draws from such acts the inevitable conclusion that innocence does not dictate such precautions to its vindication or protection. The relation ordinarily prevailing between

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such conduct as was charged against Turner in the misappropriation of the public funds and fines intrusted to him and the destruction of the evidence thereof leave, it seems to us, no room for cavil that the common mind could take no other meaning therefrom than that dishonesty, not innocence of moral wrong, promoted the removal of the evidence against him. So understood, so interpreted, we must hold that count 3 as originally filed, and, in consequence, count 3 of the complaint as amended, alleged language actionable per se, and hence are not subject to the demurrer treated, thus affirming the court below in its ruling in this regard.

Demurrer was interposed to the third count of the amended complaint, taking the point that in this character of action damages for physical pain and injury, claimed in the count, are not recoverable. This objection, as is the unvarying practice, should have been taken by motion to strike or by charges to the jury. Where questioned elements of damages are too indefinitely or uncertainly claimed, demurrer will be servicable to raise the inquiry; not so otherwise.—*City Delivery Co. v. Henry*, 139 Ala. 161, 34 South. 389.

The errors assigned upon the two rulings with respect to testimony are without merit. The trial court doubtless properly exercised its discretion in the allowance of the leading question quoted in assignment numbered 3. The fourth assignment is not supported by the record, in that the agreed bill of exceptions shows that a part only of the answer was moved to exclusion, whereas the assignment embraces the entire response of the witness, the first phrase of which is unobjectionable.

We discover no error in the record, and the judgment is affirmed.

Affirmed.

TYSON, C. J., and DOWDELL and ANDERSON, JJ., concur.

[Sheppard v. Austin.]

Sheppard v. Austin.*Libel and Slander.*

(Decided Feb. 5, 1909. 48 South. 696.)

1. *Evidence; Hearsay; Admissions.*—Plaintiff, in a suit for libel, testified, in answer to a question as to whether it had been reported to him that the defendant in the suit had been denouncing him as a liar, that he had an interview with defendant, and stated what he had heard that defendant had said about him, but did not tell defendant even substantially what he testified had been reported to him, as having been said by the defendant, and defendant repeated it to him. Held, such testimony was *prima facie* hearsay and not rendered competent as an admission by the defendant under plaintiff's statement.

2. *Same; Reasons for Exclusion.*—Hearsay evidence is excluded for the reason that the original statement, if correctly reported, is not under the safeguard of the personal responsibility of its author as to its truth, or the test of cross examination; and for the further reason of the probability of the introduction of falsehood and misrepresentation into a statement, either willfully or unintentionally, which probability is greatly multiplied in each repetition.

APPEAL from Birmingham City Court.

Heard before Hon. C. C. NESMITH.

Action by C. W. Austin against F. G. Sheppard. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

The libelous matter alleged in the complaint is that the defendant said of the plaintiff, falsely and maliciously, that on a certain day he swore a lie, that he swore falsely, etc.

CABANISS & BOWIE, for appellant. The court erred in overruling defendant's objection to the questions propounded to plaintiff, and his answers thereto, in reference to what he had been told by different parties as to statements made by defendant.—*Brooklyn L. Ins. Co. v. Bledso*, 52 Ala. 538; *Salem N. P. Co. v. Caliga*, 144 Fed.

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965, and authorities cited; *McDuff v. Journal Co.*, 22 Am. St. Rep. 673; 18 A. & E. Ency of Law, 1080; 25 Cyc. 492.

BOWMAN, HARSH & BEDDOW, for appellee. The court did not err in admitting the testimony complained of.—*Weir v. Allen*, 51 N. H. 177; *Patterson v. Fraser*, 93 S. W. 146; *Crane v. Darling*, 44 Atl. 359; *Smith v. Moore*, 52 Atl. 320.

DENSON, J.—This is an action for slander. There was testimony tending to show utterance by defendant of the slanderous words attributed to him in the complaint. The plaintiff, while testifying as a witness in his own behalf, was asked by his attorney this question: “I will ask you to tell the jury whether or not it had been reported to you, after that trial in the police court of Mr. Sheppard on account of a violation of the city ordinance, that he had been going about the city of Birmingham and to various and sundry people denouncing you as a liar.” The court overruled the objection of the defendant that the question called for hearsay evidence, but limited the affirmative answer to the purpose of showing humiliation, and not to proof of offense at all.” This ruling of the court is assigned for error, and is the only assignment discussed in brief of counsel for appellant.

The reasons for the rule excluding hearsay or derivative evidence are not difficult to discover, “for, apart from the circumstances that the probabilities of falsehood and misrepresentation, either willful or unintentional, being introduced into a statement, are greatly multiplied every time it is repeated, there remains the further fact that the original statement, even if correctly reported, has scarcely ever been made under the safe-

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guards of the personal responsibility of the author as to its truth, or the tests of a cross-examination as to its accuracy."—Rice on Ev. (Civ.) vol. 1, p. 367, § 212; Reynolds, Theory of Ev. §! 16, 17; 1 Greenl. (15th Ed.) § 99; 11 Am. & Eng. Ency. Law, 521; 16 Cyc. 1196; *Glover v. Millings*, 2 Stew. & P. (Ala.) 28, 43; *Brooklyn, etc., Co. v. Bledsoe*, 52 Ala. 538, 549; *Mima Queen v. Hepburn*, 11 U. S. 291, 3 L. Ed. 348; *Hereford v. Combs*, 126 Ala. 369, 380, 28 South. 582.

The question propounded and objected to supposes or implies that the statements or reports made to the plaintiff were made by a person not called as a witness, and that they are prima facie and really hearsay or derivative evidence, and therefore subject to that exclusionary rule of evidence, unless they fall within some recognized exception to the rule or are saved from exclusion upon another principle.—*Hereford v. Combs, supra*. The plaintiff, in connection with his offer to make the proof, stated to the court that he proposed to show that he went to the defendant to find out whether the report was true or not, "and it was repeated to him." If the plaintiff had stated to the defendant what he had heard, or what had been reported to him, and defendant had admitted it, the testimony admitted would have been relieved from hearsay rule.

While the plaintiff testified he did have an interview with the defendant, the majority of the court are of the opinion that his testimony as to what he "told" defendant in that interview is not even substantially what he testified had been reported to him, and, therefore, that defendant's response cannot be taken as an admission, nor operate to bring the evidence admitted, within any exception to the rule that hearsay evidence is inadmissible. Consequently they hold that the trial court committed reversible error in admitting the testimony. The

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writer entertains the opinion that, in the interview between plaintiff and defendant, plaintiff's statement to defendant conformed substantially to his (plaintiff's) testimony, and that the jury might infer from the defendant's reply an admission that he had uttered the statements which plaintiff testified had been reported to him. Upon first impression we were of the opinion that the testimony objected to was admissible on the ground held good by the trial court; but after more mature reflection we have reached the conclusion that that theory is unsound, and that the case cited by appellee's counsel in support of it (*Patterson v. Frazer* [Tex. Civ. App.] 93 S. W. 146) is not in point, when the facts of that case are closely scrutinized.

It results, from the holding of the majority, that reversible error was committed by the court in admitting the testimony. The judgment must be reversed, and the cause remanded.

Reversed and remanded.

TYSON, C. J., and DOWDELL, SIMPSON, ANDERSON, and MAYFIELD, JJ., concur. DENSON, J., dissents.

Hyde v. Cain.

Action for Assault and Battery.

(Decided June 30, 1908. 47 South. 1014. Rehearing denied December 2, 1908.)

1. *Assault and Battery; What Constitutes.*—Any touching by one person of the person or clothes of another in rudeness or in anger is an assault and battery.

2. *Trial; Instructions Ignoring Issue.*—Although the evidence showed an assault and battery, a charge asserting that if the jury believe the evidence they should find the issues in favor of the plaintiff was erroneous, where there was a plea setting up that at the

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time of the alleged assault plaintiff was on defendant's premises and refused to leave although requested to do so, whereupon defendant ejected plaintiff using only such force as was reasonably necessary therefor, and there was evidence tending to support the plea.

APPEAL from Jefferson Circuit Court.

Heard before Hon. A. O. LANE.

Action by Alice Cain against George Hyde for an assault and battery. Judgment for plaintiff defendant appeals. Reversed and remanded.

WARD & WARD, for appellant. The court erred in giving the general charge.—*Tabler, et al. v. Sheffield Co.*, 87 Ala. 305; *E. T. V. & R. R. Co. v. Baker*, 94 Ala. 632; *Holmes v. Bir. S. R. R. Co.*, 140 Ala. 208. The question of the assault should have been submitted to the jury.—8 Cyc. 1066; *Ib.* 1099, subd. 8.

GIPSON & DAVIS, for appellee. The court properly gave the affirmative charge for the plaintiff.—*Lunsford v. Walker*, 93 Ala. 36; 1 Ency on Evi. 995; 3 Cyc. 1021.

McCLELLAN, J.—Action for damages, in code form, for assault and battery. The only error assigned is predicated upon the giving at the request of plaintiff (appellee) of this charge, viz.: "The court charges the jury, if the jury believe the evidence, they must find the issue in favor of the plaintiff." The pleas were general issue and special plea 4 (to which demurrers were overruled), as follows: "(4) That the plaintiff, at the time of the alleged assault upon her, was on the premises of defendant, and that defendant ordered or requested her to leave, which she failed to do, and upon such failure defendant attempted to eject her or make her leave, and only used such force as was reasonably necessary to accomplish same, and that, if any assault was committed on plaintiff, it was the said efforts of defendant to eject

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her as aforesaid." The issues presented are apparent.

An assault and battery is described in *Jacobi's Case*, 133 Ala. 17, 32 South. 163, thus: "Any touching by one person of the person of another in rudeness or in anger is an assault and battery. * * *" In *Engelhardt v. State*, 88 Ala. 103, 7 South. 154, this language is approvingly quoted: "A battery is not necessarily a forcible striking with the hand, or stick, or the like, but includes every touching or laying hold (however trifling) of another's person, or his clothes, in an angry, revengeful, rude, insolent, or hostile manner." Since a battery always includes an assault, the uncontroverted testimony in this case would have warranted the court, on the inquiry presented by the complaint alone, in giving the affirmative charge for the plaintiff. But that pleading was not the only source of issue in the cause. The fourth plea sought to justify the assault and battery upon the right of one to eject a trespasser from his premises, which embraces the obligation to effect such a lawful purpose by use of no more force than was necessary thereunto. Pretermittting any other consideration in respect to the plea, this was, under the whole evidence adduced on the trial, a question for the jury; and the charge quoted before erroneously deprived the defendant of that right.

The judgment is reversed, and the cause is remanded.
Reversed and remanded.

TYSON, C. J., and HARALSON, SIMPSON, ANDERSON, and
DENSON, JJ., concur.

[First National Bank of Decatur v. Henry.]

First National Bank of Decatur v. Henry.

Assumpsit.

(Decided May 11, 1905. Rehearing denied Nov. 15, 1906.
49 South. 97.)

(The publication of this case was held up pending its determination by the United States Supreme Court.)

1. *Banks and Banking; Liability to Depositor; Deposit by Partner for Benefit of Firm.*—Where a member of a firm made a deposit in its favor of his own money taking a note from the firm for the amount of the deposit payable at bank, and on making the deposit took a deposit slip reciting that the deposit was to be protected by the bank for his benefit by compress receipt and bills of lading sufficient to cover the amount, the receipts to be deposited with the bank in like manner as other similar accounts, the effect of the whole transaction was a loan from him to the firm on their note, the money to be turned over to them by the bank when they deposited collateral for his benefit, so that he held the double obligation of the firm for the money, if the firm got it from the bank, and the obligation of the bank not to let the firm have the money without the deposit of collateral, the note not affecting the transaction between the depositor and the bank. The effect of the contract being that the bank would protect the deposit for the benefit of the depositor by taking from the firm compress receipts and bills of lading sufficient to cover the amount thereof, or that it would keep at all times the amount deposited or compress receipts or bills of lading deposited by the firm sufficient to cover the amount, or so much thereof as the bank let them have, and the bank was bound thereby unless released.

2. *Corporations; Organization.*—Under the facts in this case it is held that the corporation known as Knight Henry & Co., was duly incorporated under the proceedings prescribed by the court of 1896, and contained in sections 1251-1260.

3. *Same; Estoppel to Deny Corporate Existence; Parties.*—Where parties contract with each other as corporations, in respect to such contract they are estopped to deny corporate existence.

4. *Banks and Banking; Special Deposits.*—A deposit is special when it is a deposit of stocks, bonds and other securities, or of money to be specially kept and returned to the owner, or money deposited for a fixed period of time, or on unusual conditions, which is mingled in the general fund like a general deposit and repaid therefrom, or money which is to be applied by the bank at the depositor's request for specific purposes.

5. *Same; National Banks; Liability to Depositor.*—Although there may be some ultra vires agreement connected with the transaction

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a national bank who has lawfully received property must account for it or its proceeds; it cannot escape liability for money placed in its hands by setting up that it made an *ultra vires* agreement with the depositor to pay out the money to some third person on deposit of collateral for the depositor's benefit, where it is shown that it paid out the money to such person without taking the collateral agreed on.

6. *Same; Default as Collecting Agent; Measure of Damages.*—The holder of a bill or note is entitled to recover of a bank guilty of negligence or default as a collecting agency as measure of damages, the actual loss suffered, which is *prima facie* the amount of the bill or note placed in its hands; but evidence is admissible to reduce it to a nominal sum.

7. *Same; Failure to Secure Debt of Third Person to Deposit; Evidence.*—Unless the bank showed that it had taken receipts or bills of lading sufficient to cover the amount deposited and which it had paid out to a third person under the contract, it could not avail the bank to show that there had been a shrinkage in the value of cotton, the action being against the bank for failure to take warehouse receipts for cotton, and bills of lading as collateral security, for the indebtedness of such third person.

8. *Confusion of Goods; Commingling of Collateral; Liability of Bank.*—Where a bank commingled its own collateral for cotton given to secure its own debts with collaterals which it held to secure a note payable to its bank owed to a depositor in such a way that it was impossible to distinguish one set from the other, all the collaterals became the property of the depositor for the security of his debt.

9. *Corporations; Liability for Wrong; Ultra Vires.*—The doctrine of *ultra vires* has no application as a defense to an action for a wrong of which a corporation is guilty.

10. *Same; Liability for Acts of Servant.*—Corporations are liable for the acts of their servants done in the scope of their employment in the same manner and to the same extent that individuals are liable under like circumstances.

11. *Actions; Waiving Tort and Suing on Account.*—The owner of goods in possession of another, who without legal excuse refuses to deliver them to the owner on demand, may elect to sue as for a conversion or waive the tort and treat the wrong doer as a purchaser, and sue and recover on account for the value of the goods.

(Tyson, C. J., Simpson and Deason, JJ., dissent.)

APPEAL from Morgan Circuit Court.

Heard before Hon. O. KYLE.

Assumpsit by A. G. Henry against the First National Bank of Decatur. Judgment for plaintiff and defendant appeals. Affirmed.

HARRIS & EYSTER, E. W. GODBEY, and W. L. MARTIN, for appellant.

[First National Bank of Decatur v. Henry.]

GOODHUE & BLACKWOOD, for appellee.

HARALSON, J.—The undisputed facts are, that on the 2d of October, 1900, the plaintiff, A. G. Henry, deposited with the defendant bank \$12,000, taking a certificate of deposit as follows: "First National Bank of Decatur. \$12,000.00. Decatur, Alabama, Oct. 2, 1900. A. G. Henry has deposited in this bank, twelve thousand dollars payable to the order of himself, Dec. 15, 1900, on the return of this certificate properly endorsed. Interest, at 3 per cent. if left twelve months. W. W. Littlejohn, Cashier."

The money that this certificate represented, was the money of and belonged to the plaintiff, and was not the money of his firm, Knight, Henry & Co., at that time existing, or of the corporation afterwards formed under the same name, of which he and others were stockholders, nor of any other person, so far as appears. Knight, Henry & Co., had no claim to this money. It was wholly that of plaintiff. The corporation of Knight, Henry & Co., and plaintiff were as distinct and independent as two persons could be.

It is shown that thereafter, on December 15, 1900, the plaintiff surrendered said certificate of deposit (of the 2d of October 1900), and deposited (in said bank) the amount therein and thereby called for, to the credit of Knight, Henry & Co., receiving therefor a deposit slip or ticket in words and figures as follows:

"First National Bank. Deposited by Knight, Henry & Company, Decatur, Alabama, 12/15, 1900, by A. G. Henry \$12,000.00, to be protected for benefit of A. G. Henry by compress receipts or bills of lading sufficient to cover above amount, said receipts to be deposited with the bank by Knight, Henry & Company in like manner as other similar accounts. W. W. Littlejohn, Cashier."

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On the same date, the plaintiff took from Knight, & Co., their note for \$12,000, which was as follows: "Decatur, Alabama, December 15th, 1900. By September 1, 1901, we promise to pay to A. G. Henry or order, through the First National Bank of Decatur, Ala., twelve thousand dollars for value received, at 6 per cent. And we hereby waive all exemptions under the laws of the state of Alabama, and agree to pay ten per cent. attorney's fees if collected by law. (Signed), Knight Henry & Co., by J. W. Knight, Secretary and Treasurer."

This was the same money for which the foregoing certificate of deposit was given by the bank. If the note had been paid in whole or in part by the maker, that would have been a satisfaction to the payee, the plaintiff, to the extent of the payment, and between the bank and him, there could have existed no indebtedness for the amount of the payment growing out of that certificate of deposit, and the money remaining in the bank would have belonged to the makers of said note. It turned out as the evidence tended to show that there were some payments made on said note, and to the extent of such payments, if made, the jury were charged that the note was entitled to credit. The note as has been suggested, was simply the promise of Knight, Henry & Co., to repay the money which they were to get under the terms and stipulations of the contract entered into between the bank and Henry, without effect upon the transaction between Henry and the bank. "The effect of the whole transaction was that Henry loaned the money to Knight, Henry & Co., taking from Knight, Henry & Co., their note, and the money was left in the hands of the bank to be turned over to Knight, Henry & Co., when Knight, Henry & Co., deposited with the bank collateral for the benefit of Henry. So, the plaintiff held the double, though not inconsistent obligation

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of Knight, Henry & Co., for the money, if they got it from the bank, and also the obligation of the bank, not to let them have the money without the specified collaterals.

It is not disputed that the bank did not comply with the stipulation in the certificate of deposit to protect the \$12,000 for the benefit of plaintiff, by taking and holding for Henry compress receipts or bills of lading sufficient to cover the amount, although it lent Knight, Henry & Co., the full amount.

The cashier testified, that the plaintiff about the 1st of September, 1901, demanded the \$12,000 or the compress receipts or bills of lading, and he told him that the bank did not owe him anything, that he owed the bank; that they did not have any such collaterals for him; that they had some on hand but none for him. The plaintiff testified also, that about the 1st of September, 1901, he demanded the money or bills of lading, and the cashier told him that they did not have anything—compress receipts, bills of lading or the money.

There are 12 counts in the complaint, and, as stated by counsel, the first 6 of the 12 rely upon the breach of the agreement entered into between plaintiff and the bank, whereby the bank contracted to protect the \$12,000 for the benefit of the plaintiff, by taking bills of lading and compress receipts to cover that amount if loaned. These counts are all based on the breach of this contract, framed to meet the varying phases of the evidence. The seventh, eighth, ninth, tenth and eleventh counts are common counts for money had and received, money paid, money lent and money due by account.

The case was tried upon the general issue and the plea of payment and set-off.

The court below, at the request of the plaintiff charged the jury, that if they believed all the evidence, they

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should find for the plaintiff, and that the measure of his recovery would be the \$12,000 sued for, together with the interest thereon, less a credit of \$1,267.45 of date September 2, 1901, and less a further credit of \$1,000, if the jury should find from evidence that Henry consented to release this \$1,000.

There are in the case a vast number of assignments of error, 135 on pleadings alone. It would be an almost endless and an unnecessary task to pursue these assignments, since they are referable to and determinable by a few leading facts and principles.

In construction of the certificate of deposit, counsel for defendant in brief say: "The first part of the instrument is not different from any ordinary deposit slip. It evidences merely the deposit of \$12,000 to the credit of Knight, Henry & Co., by A. G. Henry. Added to this was simply the stipulation: 'To be protected for the benefit of A. G. Henry by compress receipts and bills of lading sufficient to cover amount; said receipts to be deposited with the bank by Knight, Henry & Co., in like manner as other similar accounts.' There are but two constructions in the case, and that is whether the collateral was to be deposited before the withdrawal of the funds, or any part thereof (whether the bank's receipt of the collaterals was to be a condition precedent to the use by Knight, Henry & Co., of the money deposited to their credit); and second, whose duty it was to see that the deposit was protected." Much argument is indulged in by them to show, that the collaterals provided for were not to be deposited before the withdrawal of the funds by Knight, Henry & Co., and that they alone and not the bank, were authorized to handle the collaterals. It is also insisted by them, that the certificate as to taking collaterals, was *ultra vires* as to the bank, its cashier and Knight, Henry

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& Co.; that Knight, Henry & Co., was not a corporation, etc.

The contention of the plaintiff, which seems to us to be reasonable and according to the terms of the certificate of deposit, is that by this contract the bank in substance agreed, that it would protect this \$12,000 for the benefit of A. G. Henry by taking from Knight, Henry & Co., compress receipts and bills of lading, sufficient to cover the amount of the \$12,000 that it let go to Knight, Henry & Co.; or, that the bank agreed that it would have and hold at all times either the \$12,000, or compress receipts or bills of lading deposited by Knight, Henry & Co., sufficient to cover the \$12,000, or so much thereof as the bank let them have. That is the plain and unambiguous language of the certificate, and it defies argument to make it plainer. The bank is bound by it, unless released therefrom on some other principle. It guaranteed the protection stipulated, and it would seem to be against all reason, that Knight, Henry & Co., the party to whom the money was to be lent, and against whom protection was to be sought, should have the entire control of the collaterals, as to whether any should be furnished or not, and the amount and character. The contention seems to be that the bank had the right to let the money go to Knight, Henry & Co., without the deposit of any collaterals whatever and that the obligation to put collaterals in the bank rested wholly upon Knight, Henry & Co., a corporation, that was not even a party to the contract. If this were true, the letter as well as the spirit of the contract would be abrogated.

It is contended that Knight, Henry & Co., was not a corporation, but the contention seems to be without merit. The reason for the insistence is, as it would seem, as suggested by plaintiff's counsel, that a partnership had existed under the name of Knight, Henry & Co., and if a

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partnership and not a corporation, then Henry was responsible for the money taken from the bank by Knight, Henry & Co., and this would destroy his right of action against the bank. An examination of the record shows that the company was incorporated on the 23d of November, 1900, by proceedings instituted for that purpose in the probate court of Jefferson county. A declaration was filed in said court signed by A. G. Henry and Robert N. Bell, on the 26th of October, 1900, giving the names and residences of the subscribers, the name of the company, Knight, Henry & Co., a cotton company, the purposes for which organized, and the nature of the business to be carried on, its principal place of business, the amount of the capital stock and the number of shares into which it was to be divided, etc.

A commission was, accordingly, duly issued to said parties, authorizing them to open books of subscription. Afterwards, on the 26th of October, 1900, a report was made and filed by the subscribers; that they were called to meet together, that 50 per cent. of the proposed capital stock had been subscribed in good faith, etc., and that they had organized under the name of "Knight, Henry & Co., a cotton company," by the election of a board of directors, a president, secretary and treasurer, etc. On the 23d of November following, a certificate of incorporation was regularly issued to said parties by the judge of probate, certifying that the said parties, their associates and successors were duly organized as a corporation under the name and style of Knight, Henry & Co., for the purposes expressed in their said declaration, etc.

So far as has appeared, the proceedings seem to have been in close conformity to chapter 28, art. 11, of the Code of 1896 (sections 1251-1260). Furthermore, the record shows, without conflict, that the bank dealt with Knight, Henry & Co., as a corporation in this transac-

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tion. Henry testified that when he made the deposit, he called the attention of Mr. Littlejohn, the cashier, to the incorporation, and stated to him, that he was no longer a partner of Knight, Henry & Co.; that the business was incorporated; and Mr. Littlejohn testified that, "on December 15, 1900, when Mr. Henry made this deposit, he said that the business that they were carrying on was a corporation business. I wrote his certificate of deposit and took for it the deposit slip of Knight, Henry & Co. He said the business had changed, that the business of Knight, Henry & Co., was a corporation."

"When parties contract with each other as corporations, they are in respect of such contracts estopped to deny corporate existence."—*C. & C. G. Co. v. F. L. Co.*, 121 Ala. 340, 25 South. 506.

Much has been said with the view of showing that the transaction of this deposit with the bank was ultra vires. Primarily, deposits with a bank are special or general, special like stocks, bonds, and other securities, and sometimes money, to be specially kept and returned to the owner, or money deposited for a fixed period of time, or on unusual conditions, which is mingled in the general funds like a general deposit, and is repaid therefrom; or money which is to be applied by the bank at the depositor's request for specific purposes.—5 Cyc. 313.

In the same volume (pages 558, 559) it is said: "A national bank can purchase notes and bills; rediscount notes or collateral security; borrow on its own notes; deal in national bonds; compromise a debt; pay money and take securities in settlement; receive special deposits, besides those usually received by banks; endorse and guarantee paper, and issue a certificate of deposit." In that respect its powers seem to be as ample as other banks.

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In *National Bank v. Graham*, 100 U. S. 699, 25 L. Ed. 750, it is laid down, that a national bank is lable for damages occasioned by the loss, through gross negligence, of a special deposit made in it with the knowledge and acquiescence of its officers and directors; that gross negligence on the part of a gratuitous bailee, though not a fraud, is in legal effect, the same thing, and that the doctrine of ultra vires has no application in favor of corporations for moneys converted by them.

Whether the principle of ultra vires invoked in this case has application, it is, perhaps, unnecessary for us to decide. The evidence shows without dispute, that the bank commingled its own collaterals for other cottons, to secure its own debts, with the collaterals if any which it held to secure the debt of plaintiff, in such a way that it was impossible to distinguish between them,—the one set from the other. In such condition, all the collaterals became the property of plaintiff to secure his debt. The principle has been thus stated: “When the trustee mixes the trust money with his own, so that it cannot be distinguished what particular part is trust money and what part is private money, equity will follow the money by taking out the amount due the cestui que trust. * * *

An agent is bound to keep the property of the principal separate from his own. If he mixes it up with his own, the whole will be taken, both at law and in equity, to be the property of the principal until the agent puts the subject-matter under such circumstances that it may be distinguished as satisfactory as it might have been before the unauthorized mixture on his part. In other words, the agent is put to the necessity of showing clearly what part of the property belongs to him, and so far as he is unable to do this, it is treated as the property of the principal. * * * It would be inequitable to suffer the fraud or negligence of the agent to prejudice the rights of the principal.”—*Harrison v. Smith*,

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83 Mo. 210, 53 Am. Rep. 571; 1 Story's Eq. § 468; *M. Bank v. Walker*, 130 U. S. 267, 9 Sup. Ct. 519, 32 L. Ed. 959; *Burnes v. Campbell*, 71 Ala. 272.

The evidence in the case shows that the bank did not keep any collaterals it may have taken to secure the plaintiff's money distinguishable from any other, and when plaintiff applied for his money or his collaterals, he was informed that the bank had neither for him.

It appears that Knight, Henry & Co., became insolvent and assigned, and the bank received from the assignee payment for the compress receipts it had at the time plaintiff made demand on it. The cashier testified, that on the occasion of his demand, the bank had some receipts, but they were all to secure the bank, and he made no further demand.

The proof shows, as has been stated, that the bank received pay for these collaterals. The principle applies, that a national bank having lawfully received property must account for it or its proceeds notwithstanding some ultra vires agreement connected with the transaction. As contended by counsel, it cannot escape liability to Henry for the \$12,000 which he placed in its hands by pleading that it made with him an ultra vires agreement to pay out this money to some third person upon the production and deposit of collaterals for his benefit, when the evidence shows it paid out the money without taking the collaterals agreed upon. The bank, as appears, is whole, has lost nothing by the transaction, and Henry is out the larger part of his money. "Corporations are liable for every wrong of which they are guilty, and in such cases the doctrine of ultra vires has no application," and "corporations are liable for the acts of their servants, while engaged in the business of their employment in the same manner and to the same extent that individuals are liable under like circumstances."—*Merchants' Bank v. State Bank*, 10 Wall. 605, 644, 645, 19

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L. Ed. 1008; *Logan County N. B. v. Townsend*, 139 U. S. 67, 11 Sup. Ct. 496, 35 L. Ed. 107; *First N. B. of G. F. v. Anderson*, 172 U. S. 573, 19 Sup. Ct. 284, 43 L. Ed. 558.

"The measure of damages which the holder is entitled to receive of the bank or other collecting agent who has been guilty of negligence or default in respect to it is the actual loss which has been suffered. The loss is prima facie the amount of the bill or note placed in its or his hands; but evidence is admissible to reduce it to a nominal sum."—1 Dan. on Nego, Instruments, § 329; *McPeters v. Phillips*, 46 Ala. 496.

"The owner of goods in the possession of another party who, without legal excuse refuses to deliver them to the owner on demand may sue in tort for a conversion, or he may waive the tort and treat the wrongdoer as a purchaser and sue and recover upon account for their value."—*Bradford v. Patterson*, 106 Ala. 401, 17 South. 536; *Potts v. First N. B.*, 102 Ala. 286, 14 South. 603.

It was proposed to be proved that the prices of cotton fluctuated and at times was low. Unless the bank showed that it had taken the warehouse receipts or bills of lading sufficient to cover the amount, which it did not attempt to do, it could not avail the bank to show that there had been shrinkage in the value of cotton. That question could only arise in the event the bank should show that it had once taken collaterals sufficient to cover the amount; that it still had the identical collaterals on hand for the benefit of plaintiff, and that they had diminished in value on account of a shrinkage in the price of cotton. The bank insisted it had no collaterals for the benefit of plaintiff.

The judgment below is affirmed.

MCCLELLAN, C. J., and DOWDELL and ANDERSON, JJ., concur.

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On Rehearing.

On application for rehearing WEAKLEY, C. J., and DOWDELL and ANDERSON, JJ., concur in the result.

TYSON, J. (dissenting.)—The appellee was a member of a partnership at Decatur, Ala., under the name of Knight, Henry & Co., which did business with the appellant during the cotton season of 1899 and 1900, and up to November of the latter year, when the said firm was indebted to appellant in a large sum; the amount being \$20,000 or more. On the 2d day of October the appellee individually deposited with appellant \$12,000, taking a certificate reciting such deposit and that it was to bear interest at 3 per cent. if left for 12 months. In November it seems the appellee formed a corporation to succeed the copartnership under the same name of Knight, Henry & Co., and which did succeed to the business which was that of dealing in cotton. The assets of the firm were transferred to the corporation in payment of subscriptions to capital stock, and the appellee was president and Knight was the manager and secretary and treasurer. There was no change in the way of doing the business. The account of the firm of Knight, Henry & Co., with appellant was continued under the same name and embraced all the dealings of the corporation with appellant after it succeeded to the business. Thereafter, on the 15th of December, after the firm had ceased to exist and the corporation had succeeded to its assets and business, the appellee surrendered his certificate of deposit and had the money it called for passed to the credit of Knight, Henry & Co., on the books of the appellant. And the appellee on the last of December, 1900, took the note of the corporation for this \$12,000 so deposited, dated back to 15th of December, and had it stip-

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ulated therein that it was to bear interest at 6 per cent. and was payable in bank 1st of September, 1901. The corporation continued in business until September, 1901, when it became insolvent and made an assignment for the benefit of its creditors. The appellee filled the office of president under a stipulation that he should draw a salary; and he collected on the note taken for said \$12,000 on September 2, 1901, the sum of \$1,261.45. After the failure of the corporation the appellee brought this suit on an alleged liability of the appellant to him growing out of said deposit of \$12,000.

When the deposit of the \$12,000 was made, on the 15th of December, 1900, the firm had ceased to exist. The plaintiff below himself testified that it terminated on the 23d of November, and he informed the appellant, at the time of making the deposit, that the corporation had succeeded to the firm, and that the firm was no longer in business. The appellee also testified that the money was intended to be used by Knight, Henry & Co., in buying cotton; that is, in business thereafter to be transacted. Therefore there can be no doubt the deposit was intended to be to the credit of the corporation, and this is corroborated by the fact that appellee took the note of the corporation for the amount due September 1, 1901. At the time of making the deposit to the credit of Knight, Henry & Co., a deposit slip was issued by the appellant and given to appellee in these words and figures: "First National Bank. Deposited by Knight, Henry & Company, Decatur, Ala., 12/15, 1900, by A. G. Henry, \$12,000.00, to be protected for benefit of A. G. Henry by compress receipts or bills of lading sufficient to recover above amount, said receipts to be deposited with the bank by Knight, Henry & Co., in like manner as other similar accounts. W. W. Littlejohn, Cashier." The appellant's liability is supposed in some

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way to arise out of this transaction. After the deposit the said Knight, Henry & Co., continued business with appellant until its failure. It would get money to buy cotton, and make payments with drafts against bills of lading attached, and until shipment would deposit compress receipts for the cotton. The \$12,000 deposit went into the general account of the concern as a credit, and on the insolvency of the corporation there was nothing in the hands of the bank, except what was held for the balance due, and such securities as it had, were turned over to the assignee on the discharge of the debt by him with the consent of the appellee under an agreement.

The claim of the appellee is that the bank is liable to him for this \$12,000, because it let the corporation have this money and did not take and hold for his account and deliver to him on demand, in September, 1901, compress receipts and bills of lading for cotton sufficient to cover the same. This, of course, involves the construction of the deposit slip, and not only the capacity of the appellant to make a contract such as the appellee insists it made, but also a consideration and interpretation of the whole conduct of the parties after the transaction, so far as it tends to show the understanding and interpretation put upon the writing by themselves, and also the transactions between the appellee and the corporation, so far as they tend to raise an estoppel against the plaintiff to maintain this suit. The appellee, on the maturity of the corporation note held by him, before commencing his suit, demanded the \$12,000 or compress receipts and bills of lading from appellant to cover the same, and then went to the office of the corporation and made the collection noted above on the note he held against it.

The plaintiff preferred his claim in 12 counts. The first 6 claim damages in varying forms for the breach of

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an agreement by which defendant promised, in consideration of the deposit of \$12,000 with it, to turn over the same to Knight, Henry & Co., upon the delivery by them of compress receipts or bills of lading for cotton of equal value to the amount of money turned over, and to hold such receipts for the protection of the plaintiff, averring that defendant breached this agreement by turning over the money without taking the collaterals and delivering the same to plaintiff on demand in September, 1901, whereby the said sum of \$12,000 was wholly lost to plaintiff. We think it well to dispose of these 6 counts preliminarily, as they involve the gist of the action; and viewing the whole case, including the proofs offered, and which should have been admitted, we feel no hesitation in saying that upon no reasonable hypothesis can it be maintained that the appellant entered into any such engagement as the appellee claims as the basis of his suit, or that the appellee so thought until after the collapse of the late concern of Knight, Henry & Co.

The parties were acquainted with the nature of their own and each other's business. They each knew that the business of Knight, Henry & Co., was that of buying, selling, and shipping, and drawing against successive lots of cotton, and that money used in the course of business in the purchases would not and could not remain in one investment, but would be continually transferred from one transaction to another during the entire season. Therefore, when the appellee put money with the appellant to the credit of Knight, Henry & Co., "to be used in the purchase of cotton" in the business of the concern, he could not reasonably have meant or intended anything else than that the money was to be used at pleasure in the ordinary conduct of the business, and to be repaid to him by Knight, Henry & Co., when and on such terms as had been or might be arranged between

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him and them. He made no terms as to any duty or agency of the appellant in these respects, and it assumed none. The appellee's after conduct and that of Knight, Henry & Co., demonstrate that this was the view and understanding of each of them of the transaction, for appellee took from Knight, Henry & Co., and they gave to him a note, dated December 15, 1900 (the day of the deposit), for the amount of the loan, due September, 1901, at 6 per cent. interest, without any reference whatever to any duty, agency, or even knowledge on the part of the appellant as to the matters; and to reduce the affair to an absolute demonstration the appellee says to the manager of his company, in a letter of the 28th of December, 1900 concerning the affair of taking the note for the loan: "You would (on sending note) credit (me) with \$12,000, and charge me back with the note, which, of course, would settle the transaction"—and showing further in the same letter an intention to discount the note at any time he wanted to use it. And in a letter of previous date (December 21, 1900) says to the same manager of his company: "Please send me note for \$12,000, deposited to our credit, while there (at Decatur), make it payable at bank due at any time up to September 1, 1901, bearing 6 per cent. I request this, because I can take the note, and endorse it and use it, should I need to do so, and not inconvenience our firm in the least." And, the note being given, the appellee afterwards, on August 22, 1901, wrote again to his manager of "our firm," calling attention to a letter of May 24, 1901, and saying: "If you will look at my letter to you on May 24, 1901, you will see that I have fully notified you that I would collect the above note (of \$12,000 due September 1, 1901) when due. In order to call your attention to it, I fully underscored the notice and made it imperative, by using the words 'must be paid

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when due, both principal and interest.' * * * Mr. Knight, I do not mean to be hard with you; but, under the circumstances, I do not think you should have put yourself in a position to hurt the business to pay off that note (of \$12,000), or any other paper when due. I have made other arrangements for my money, and shall expect the note and interest paid when due; in fact, I will need the money." On April 20, 1901, in reply to a letter from plaintiff, defendant wrote to him the following letter: "Decatur, Ala. April 20, 1901. Dear Sir: We are in receipt of your favor of the 18th instant. We are doing all we can to keep the account of Knight, Henry & Co., covered by a sufficient amount of compress cotton receipts and bills of lading, including the amount deposited by you to the credit of Knight, Henry & Co., and, while we do not hold enough to cover the entire account at present prices of cotton, we are assured by Mr. Knight that, with the money due the concern from New York and other places, he has assets of the company sufficient to cover everything. We have just had a talk with him, and can see no reason for uneasiness, but have insisted that he deposit receipts or bills of lading sufficient to cover everything. This is all we can do, and will continue to insist that receipts be deposited to cover everything. Will you kindly send me copy of memorandum on your deposit slip. Yours truly, W. W. Littlejohn, Cashier."

Here, now, is the construction clear, beyond mistake, that the plaintiff put upon the deposit slip sued on in this case. Here is the construction put upon it by Knight, Henry & Co., with plaintiff's knowledge, consent, and recognition. Here is the construction put upon it by the defendant, with notice to plaintiff of that construction, and no recognition thereof, but a continuance of business for six months under that construction.

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And that construction in each instances, known to all and acquiesced in and acted on by all, was and is that the deposit of \$12,000 was absolute to the credit of Knight, Henry & Co., on the 15th of December, 1900, and that the keeping of the account good by collaterals was wholly a matter between Knight, Henry & Co., and the plaintiff, and that the defendant was only to receive collaterals as they might be brought in for the account. Not only is this the construction put upon the transaction ante litem motam, when there was no motive other than to conform to the truth, but we will now show that it would have been unreasonable for the plaintiff to have expected the defendant to make, the contract he now insists on, and, beyond this, that such a contract would have been ultra vires so far as the defendant is concerned.

Taking it, first, on the part of the defendant; would or could any reasonable cashier undertake for his national bank to receive \$12,000 from the appellee and dole it out to the plaintiff's own corporation, as called for, on time of payment and terms of interest to be agreed on by the defendant as his agent, on collaterals to be deposited to cover the same, which were subject to violent fluctuations in value, and to renew these transactions constantly from December 15, 1900, to September 1, 1901, the limit of credit given by the plaintiff to the corporation in the note for the \$12,000, without profit or the chance of profit to the bank, but with great risk from possible fluctuations in the price of cotton, which sometimes varies to the extent of more than a half cent per pound in a day? It seems clear to us that the answer must be in the negative. Yet that is precisely the contract sued on. Then, as to the plaintiff, who is evidently a business man; would it have been other than irrational in him to suppose the defendant would or could undertake such a business, or for him, being willing to

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lend his money to his own corporation for business purposes, but requiring ample security therefor, to place it to the credit of the corporation with the bank it was doing business with, without previously having an agreement with his corporation as to the terms, time, and conditions of the loan, and without any precise terms as to time and interest upon which the money was to be allowed to be checked out and without at least a contract of agency about which there could be no controversy? Being president of his own corporation, why could he not make his own contract? Why should he want or expect an unpaid agent, defendant bank, to undertake this business for him? No business man, it may be safely assumed, would have made such a contract as the plaintiff now asserts he made; and the truth is he never made it and it is unreasonable, from the inherent improbability of the thing, and from the acts of all the parties with the plaintiff's assuiscence, and more particularly from the repeated and plain acts of the plaintiff himself, to suppose for a moment that he ever believed that he had made any such contract. Would he, or could he, if he had any thought that he had left \$12,000 with defendant to lend to his own corporation, at its discretion as to time and interest, and on securities to be passed upon by defendant from time to time, and to be renewed and reloaned on new securities as cotton was sold, or to be held indefinitely on the same cotton receipts, have gone to his corporation, and, without any notice whatever to defendant for nearly a year taken its note, due nine months thereafter, on 6 per cent. interest, and have written to his corporation: You will credit me with \$12,000 deposited by me on 15th December to the credit of our firm when I was in Decatur and charge the note to me, "which, of course, would (will) settle the transaction?" Is it to be suppos-

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ed that plaintiff, when writing these letters, and taking this note, and insisted on its payment when it should fall due, though he had an outstanding agency with the defendant to lend this same money to the same party on collaterals ample to cover the short loans and each renewal as cotton was sold? What anxiety would the plaintiff have about his concern paying the debt at maturity, if the defendant was to be liable unless it could turn over at any time, on demand of the plaintiff, warehouse or compress receipts ample to cover the debt?

If the plaintiff had originally intended to make the contract as he now insists he did make it, viz., to leave his money with defendant, to be advanced from time to time by defendant for his account to his corporation on collaterals to be approved and valued by defendant as his agent, and to renew these transactions as cotton was sold during the season, it is clear that he took the matter in his own hands when he took the corporation note at nine months for his money at interest for the whole period, and made no allowance for the time the money might be idle in defendant's hands before the advance on collaterals, and for the time it might be idle on repayment of the loans and before another could be made on satisfactory terms, of which defendant was to be the sole judge. If plaintiff conceived he had such an agency with defendant, is it not unreasonable that he would have neglected to notify the defendant of his having taken the matter in his own hands? And the fact that he gave no such notice shows that the present impression of the nature of the transaction with defendant is entirely an afterthought, having for its purpose the saddling of his own losses in trade on the defendant.

We now turn to the writing itself for the purpose of showing that it is one of such doubtful construction as to make the practical construction put upon it by all

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the parties concerned controlling, especially in view of the unreasonable supposition, from the nature of the dealings, that either party could have intended to contract as now is insisted by the appellee. The writing is an ordinary deposit slip, made and intended as a mere receipt from a bank to its customer, given in the absence of the pass book. It is a copy, necessarily, in its main feature, of the bank entry which the bank makes of the deposit. The initial words are: "First National Bank. Deposited by Knight, Henry & Co., Decatur, Ala., 12-15, 1900, by A. G. Henry, \$12,000." Let us construe this in the light of its words, its grammar, the course of business and the after conduct of the parties. Who made the deposit? Knight, Henry & Co. By whom was it made? A. G. Henry. What does a deposit such as this mean? That the money deposited is the property of the receiving bank, but is subject to unconditional check by the depositor. This is the grammar, and this is the business understanding, of the acts recited.—*Craigie v. Hadley*, 99 N. Y. 131, 1 N. E. 537, 52 Am. Rep. 9; *Burton v. United State*, 196 U. S. 301, 25 Sup. Ct. 243, 49 L. Ed. 482; *Bank of Republic v. Millard*, 10 Wall. 152, 19 L. Ed. 897. Now, how did the parties view it, and how did they act in reference to it? Plaintiff took an unconditional note from Knight, Henry & Co., for the money due September 1, 1901, and Knight, Henry & Co., checked against the money as they chose, and the defendant paid the checks, thus showing that each party put the same construction on the transaction indicated by the words of the paper. They all understood that the money belonged to Knight, Henry & Co., that the note given for this money belonged to the plaintiff, and that the defendant bank was the custodian of the money for Knight, Henry & Co.

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Now we come to the memorandum at the foot of the deposit slip. Its words are: "To be protected for benefit of A. G. Henry by compress receipts or bills of lading sufficient to cover above amount, said receipts to be deposited with the Bank by Knight, Henry & Co., in like manner as other acts. W. W. Littlejohn, Cashier." Does this necessarily mean that the bank was the mere custodian of the money for Henry, but with authority to let Knight, Henry & Co., have it from time to time, and for such time as the bank might insist on, upon collaterals to be accepted and valued by the bank, and to collect the money as the cotton was sold and shipped out, and to renew the transactions of loan and security and collection for an indefinite time? We think not. And such a construction should not be given it if it is capable of any other meaning, for that construction would undoubtedly contradict the previous and main clause, reciting the act which this clause, it is contended, qualifies. The first clause states, not "that Henry has deposited," but "that Knight, Henry & Co., have deposited," for their account \$12,000, and Henry is only mentioned as the person by whose hand the money was deposited. "Deposited," on a bank deposit slip, means passed to the credit of the depositor, giving him the right to check at discretion. The different clauses of an instrument must be construed together as a whole, so as to give each a sensible meaning, and the minor term should never be held to so control the main clause as to make it nugatory, and especially so when to give it such control it must itself take on a construction calling for unusual, unreasonable, and ultra vires engagements, contradicting unequivocally the practical construction put upon the engagement by the parties themselves. By the main clause the money passed from A. G. Henry to Knight, Henry & Co., and the bank was the custodian

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thereof for the latter, without any control whatever over it.

What, then, does this writing at the bottom of the slip mean? It does not in terms say that the bank is to do any act, or exercise any discretion, or assume any risk. It does not say the money is to be loaned. The first clause evinces the fact of the consummated loan, and the opening words of this clause, "to be protected," refer to a status already fixed, and not to one to be assumed, by a future loan, or repeated future loans. There was no need of "protection" as the money stood, if it was held by the bank for Henry. But, if passed already to Knight, Henry & Co., it became at once a debt to Henry, and in that shape would or might need "protection." The very words of the minor clause, then, confirm, instead of contradict, the clause, by dealing with the status given to the money by the first clause. Henry, then, has himself made the money Knight, Henry & Co.'s. It is no longer to be loaned. It is already loaned, and is "to be protected." By whom it is to be protected? By "Knight, Henry & Co." The money already being Knight, Henry & Co.'s and the bank merely the custodian, the words, "To be protected * * * by Knight, Henry & Co., for the benefit of A. G. Henry, by compress receipts or bills of lading sufficient to cover above amount, said receipts to be deposited with the bank," seem necessarily to refer to some engagement, already made, or certainly to one to be made, with Knight, Henry & Co., by A. G. Henry, and, certainly, not to import any contract on the part of the bank beyond receiving such collaterals as might be deposited by that company.

And this is not only the only reasonable construction to be put on the words, but, as we have seen, is the identical construction acted on and put upon the paper by every party interested in it. The plaintiff immediately

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took an unconditional note for the whole amount, with interest for the whole period of credit, from Knight, Henry & Co., for money put "to the credit of our firm"; not to be put, or conditionally to be loaned, but a loan already consummated, and looked to them to pay it, and collected it in part; and the defendant, in April, 1901, writing to plaintiff, told him how the account of "our firm" stood, and gave him notice that all he could do was to ask Mr. Knight to keep a full line of collaterals to cover the account with the bank. And so the matter went on, cotton continually and heavily declining, until the failure in September, 1901, when it occurs to plaintiff that the defendant was his gratuitous agent to lend out his money at its discretion to his own corporation on collaterals and to collect and renew such loans on new collaterals, always to be sufficient, no matter what turn there might be in the cotton market, to cover said \$12,000 and interest.

We have seen that the words of the slip do not require, and that the conduct of the parties contradict, any such construction, and that the plaintiff's conduct is in irreconcilable antagonism with that view. If he did not make the money Knight, Henry & Co.'s when the deposit slip was taken, he made it theirs absolutely when he took their negotiable note therefor, bearing interest for the whole period of the credit. There can be no obligation in law to pay for money which still is the property of the lender, nor to pay interest on money not borrowed. The practical construction put by parties on an engagement is controlling of its meaning when there is any sort of doubt, and must often prevail over its literal meaning.—*Louche v. Bangs*, 2 Wall. 737, 17 L. Ed. 768; *Chicago v. Sheldon*, 9 Wall. 54, 19 L. Ed. 594; *Steinback v. Stewart*, 11 Wall. 576, 20 L. Ed. 56; *Insurance Co. v. Dutcher*, 95 U. S. 273, 24 L. Ed. 410; *Topliff v. Topliff*, 122 U. S.

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131, 7 Sup. Ct. 1057, 30 L. Ed. 1110; *District of Columbia v. Gallaher*, 124 U. S. 510, 8 Sup. Ct. 585, 31 L. Ed. 526; *Knox Co. v. Ninth N. Bank*, 147 U. S. 99, 13 Sup. Ct. 267, 37 L. Ed. 93; *Robinson v. Bullock*, 58 Ala. 623; *Comer v. Bankhead*, 70 Ala. 136.

But cumulative of this is the estoppel against the plaintiff, after taking the matter in his own hands and transferring the money absolutely to Knight, Henry & Co. by taking their negotiable note for the same, to insist, even if the original transaction warranted it, that the money in the hands of defendant was any longer his conditionally or otherwise. If the defendant had understood the contract as plaintiff contends, and had loaned the money to Knight, Henry & Co. on their notes for 30 or 60 days, secured by ample collaterals, and the plaintiff had before payment gone to Knight, Henry & Co. and taken their note for the money for 9 months at 6 per cent. interest, without any agreement or reference to the dealings with defendant and the collaterals held by them, is it not clear that the notes given to defendant would thereby be superseded and canceled, and that the collaterals held for their payment, without some express agreement for their transfer as security for the new note taken by the plaintiff, would revert and belong to Knight, Henry & Co.? Plainly so. The plaintiff, to complain of a turning over of the collaterals in that case, would have to say: "I left \$12,000 with you to lend on collaterals to Knight, Henry & Co. You did so. I afterwards loaned the money myself for nine months to the same firm, with interest for the whole period, but they failed, and never paid me; and I now insist that the 12,000 was never loaned by me, but remained all the while under your care for me, and you owe it to me, with interest, because you surrendered the notes and collaterals you held on my making the loan of nine months. To hold

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the defendant liable the plaintiff must demolish the barrier of his dealing with Knight, Henry & Co., to whose rights the defendant yielded. If Knight, Henry & Co., had paid their note, it would hardly be said that plaintiff could make defendant pay the \$12,000 left with them. And so, when Knight, Henry & Co., become owners of the money in defendant's hands, the plaintiff has no claim thereto, but must look to Knight, Henry & Co. In other words the defendant, in yielding to Knight, Henry & Co.'s title acquired from plaintiff, are privies of theirs and entitled to the estoppel in their favor, which undoubtedly made the money in the hands of defendant theirs, if the deposit to their credit did not do so in the first instance.—Bigelow on Estoppel, 347; 1 Greenl. Ev. §§ 189, 190. So, then, conceding that the money never became Knight, Henry & Co.'s until they gave their note for it, it seems to us there can be no doubt that the taking of the note amounted to a transfer by the plaintiff of it, and the defendant, having accounted to them, stands in secession to them, and the estoppel against the plaintiff is absolute.

But it may be urged, and correctly so, that some of the evidence we have proceeded on was excluded as irrelevant and immaterial. When the affirmative charge is given for the plaintiff, it must override all the proof legally before the court, and also that was illegally excluded. In other words, the exclusion of legal evidence competent to influence the issue against the affirmative charge is incurable error. We have considered the case under the influence of the proofs recited to show the pertinency of the evidence which was excluded. When the plaintiff founds his claim on a contract or writing requiring construction, and especially when the terms are in any respect ambiguous or indefinite, all the circumstances and situation of the parties and all the after con

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duct in relation thereto, tending to show their own construction of it, or a novation or satisfaction or discharge in whole or in part, are clearly admissible as evidence. We note some of the errors of the lower court in the exclusion of evidence :

The court erred in excluding the letters of plaintiff to J. W. Knight at Decatur, the manager of Knight, Henry & Co., of the 21st and 29th of December, 1900, in reference to the closing of the transaction of the loan of \$12,000, and in excluding the note given by Knight, Henry & Co., to him. If these letters had shown a payment of the indebtedness, they would, of course, have been received; but there is no difference between that and in showing that the plaintiff made a contract of his own with his corporation different entirely from that declared on, and superseding that declared on, if made as alleged.

The court erred in not allowing the witness Littlejohn to answer the question whether plaintiff brought the pass book of Knight, Henry & Co., to defendant with the request to make an entry on it on December 15, 1900, and also in not allowing the said witness to testify as to what knowledge plaintiff had of the credit of the \$12,000 on the books of defendant; also in refusing to allow the same witness to state whether the bank knew of the giving of the note by Knight, Henry & Co., to plaintiff; also in not allowing same witness to testify as to the manner of doing business in buying cotton and depositing warehouse receipts therefor. If the plaintiff contracted, as he alleges, it must have been intended that the business was to be conducted after the customary manner, especially as the witness testified it could be done in no other way. Also in refusing to allow the witness to state the value of the receipts kept on hand for Knight, Henry & Co.; also in refusing to allow the wit-

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ness to state the indebtedness of Knight, Henry & Co., to defendant on December 15, 1900; also in refusing to allow the witness to state whether or not it was feasible for the bank to attend to all the matters relating to the cotton business. The nature of the business, and the impossibility of a bank engaging in it, would shed light on the question of the probability of the bank promising to undertake such matters, when the question was whether or not it made such contract. Also, in refusing to allow the witness to state whether the bank could keep the cotton receipts during the season without constantly changing them. This tended to explain the business it is alleged the defendant was to undertake. Also in refusing to allow the defendant to introduce in evidence the agreement under which the collaterals held by the bank were delivered to Bell, the assignee of Knight, Henry & Co. This agreement, notwithstanding all the reservations therein, was competent evidence to show there was no conversion of collaterals by the defendant, if it was chargeable with the duty of taking them. The court erred in not allowing the witness Knight to testify as to the course downward of the cotton market. This might have caused the loss of the plaintiff's money without fault of defendant, though it took ample collaterals at the time. On this evidence being admitted, which is clearly competent, the plaintiff had no right to recover on any of the first six counts.

The other counts are the common counts for money had and received, for money paid, for money lent on account, and the last and twelfth for not paying money on demand left with the defendant for safe-keeping. There is nothing in the record authorizing a recovery on any of these counts. The only transaction shown in the evidence is that of the deposit of the \$12,000 by the plaintiff on the 15th of December, 1900, to the credit of Knight,

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Henry & Co., and by that the \$12,000 was passed by the plaintiff's own act irrevocably to the credit of Knight, Henry & Co.; and the plaintiff, no matter what impression he may have had of that transaction different from the view we have taken of it, again, by like irrevocable act, made the money Knight, Henry & Co.'s when he took their note for principal and interest, due September 1, 1901, and he further confirmed this by holding and demanding payment of the note at maturity and collecting part of it. It is entirely beyond any indulgence allowed by law to permit him, after such well-defined and plain elections to accept Knight, Henry & Co., as his debtor for the money due on their note, to look to the defendant for any responsibility on their part as to the consideration of that note.

There are one or two other points in the case which we will notice. It would seem that nothing could be clearer than that the construction which the plaintiff's contention puts upon the memorandum at the foot of the deposit slip would make the undertaking or contract ultra vires the defendant corporation, if all this had not been superseded and set aside by the plaintiff's own act in subsequently dealing directly with Knight, Henry & Co. The deposit to the credit of Knight, Henry & Co., was, of course, good. It was in the direct line of defendant's business to receive the deposit, and it was confirmed by the note taken by plaintiff from Knight, Henry & Co., and the collection thereon, and demand of payment of the balance. The defendant had this \$12,000 to the credit of A. G. Henry, and he was debtor to the defendant in the sum of more than \$20,000, and the plaintiff says, in effect, to Cashier Littlejohn, according to plaintiff's version of the matter, "Pass that \$12,000 to the credit of Knight, Henry & Co., and I want your bank to become my broker without hire, to let this money out

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on loan to Knight, Henry & Co., from time to time, and to collect on sales of cotton, and on successive collections to reloan, until I notify you to cease, but always on ample cotton receipts to cover the same, no matter how the market fluctuates." And thereupon the deposit slip was written and signed. The deposit by Henry's act passed to the credit of Knight, Henry & Co. It cannot be recalled from them. They had nothing to do with this contract between Littlejohn and Henry. That was *res inter alios acta* as to them; and, besides, immediately afterwards Henry, as we have seen, irrevocably confirms the deposit of money to their credit. He to every intent and purpose sells that money to Knight, Henry & Co., for their note and interest thereon due September 1st. And now, leaving out of view plaintiff's subsequent conduct of claiming, holding, and collecting in part the note, and at the same time of having a right to the consideration of that very note, positions as opposed to each other as the very antipodes, the simple question is: Did Littlejohn, as cashier, have authority to commit his corporation to this business of "backer to a cotton dealer," and, supposing the directorate had formally given its sanction, whether the law of corporate power is not too plain in that regard for even Mr. Henry to have supposed for a moment that the scheme was not wholly and absolutely *ultra vires*, and that the contract, in the expressive language of this court in *Machine Co. v. Wilkerson*, 79 Ala. 315, though fortified by the unanimous vote of the directorate, was not "as much a nullity as if made by a married woman (before her emancipation) or a lunatic?"

It is too plain for argument that the cashier had no power to deal for his corporation in this regard, and that the corporation itself, had it formally authorized the contract, as interpreted by the plaintiff, was entirely

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without power. And that there is no sort of estoppel in the way of the defense is equally plain. We merely cite the authorities for these obvious principles:—*Machine Co. v. Wilkerson*, 79 Ala. 315; *Chambers v. Falkner*, 65 Ala. 455; *Chewacla Lime Works v. Dismukes*, 87 Ala. 347, 6 South. 122, 5 L. R. A. 100; *California N. B. v. Kennedy*, 167 U. S. 365, 371, 17 Sup. Ct. 831, 42 L. Ed. 198; *Bank of Lyons v. Ocean Bank*, 60 N. Y. 278, 19 Am. Rep. 189; *Tiffany v. Savings Institution*, 85 U. S. 390, 21 L. Ed. 868; *Spyker v. Spence*, 8 Ala. 340; *U. S. v. City Bank of Columbus*, 62 U. S. 356, 16 L. Ed. 130; *Logan Co. N. B. v. Townsend*, 139 U. S. 67, 11 Sup. Ct. 496, 35 L. Ed. 107; *Central Trans. Co. v. Pullman P. Car Co.*, 139 U. S. 60, 11 Sup. Ct. 489, 35 L. Ed. 69; *Jacksonville M. P. R. & N. C. Co. v. Hooper*, 160 U. S. 514, 16 Sup. Ct. 379, 40 L. Ed. 515; *McCormack v. Market N. B.*, 165 U. S. 550, 17 Sup. Ct. 433, 41 L. Ed. 817; *Union Pac. R. v. Chicago, etc.*, 163 U. S. 564, 16 Sup. Ct. 1173, 41 L. Ed. 265; *First Nat. Bank v. Hawkins*, 174 U. S. 374, 19 Sup. Ct. 739, 43 L. Ed. 1007; *First Nat. Bank v. National Ex. Bank*, 92 U. S. 122, 23 L. Ed. 679. If the defense of ultra vires was necessary, it was good as to all the special counts proceeding on the alleged engagement of the defendant to act as plaintiff's agent or broker in lending his money, and there is no evidence, as we have heretofore shown, in the record to support any of the other counts. But we have shown above that the plaintiff himself took the transaction into his own hands and superseded the supposed contract with the defendant by making a loan of the money on the note of Knight, Henry & Co., due September 1, 1901, to which he must look for payment.

There are other interesting and important points which are ably discussed by counsel, but this opinion has already proceeded to such a length that we will only

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notice for a moment an additional one. The plaintiff owed the defendant on December 15, 1900, \$20,000 or more, in overdrafts of his firm. That account was continued with the new concern, call it firm or corporation, and this \$12,000 in dispute in this case balanced off that much of that debit, and the balance of the account was finally paid by the assignee, Bell. The plaintiff claims that the \$12,000 was wrongly credited and wants it back. The defendant insists that, if that credit is taken off the indebtedness due it by the original firm of Knight, Henry & Co., it will owe the same amount, and plaintiff, as a partner, would be liable for it, an undertook to set up that debt against him as a set-off or recoupment against his demand. No demurrer to these pleas was interposed, and issue was taken upon them; but the defendant was refused the right to prove them. It is clear that such evidence should have been received. Furthermore, independent of these pleas, this evidence should have been admitted under the general issue since the matter is one of recoupment.—*Grisham v. Bodman*, 111 Ala. 194, 20 South. 514.

SIMPSON and DENSON, JJ., concur with TYSON, J.

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Assumpsit.

(Decided Feb. 4, 1909. 48 South. 710.)

1. *Pleading; Conclusions; Denial of Indebtedness.*—A plea which merely states as a conclusion that the defendant did not owe the demand sued on without more fails to inform the plaintiff of what he is to meet and is not a good plea to an action on a note.

2. *Same; Construction.*—A pleading is always construed most strongly against the pleader.

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3. *Bills and Notes; Defenses; Failure of Consideration.*—Failure of consideration, to be available in defense of an action on a note must be specially pleaded.

4. *Same; Payment.*—Payment must be specially pleaded to be available as a defense to an action on a note.

5. *Same; Plea of Payment.*—As a defense to an action on a note a plea which alleges that the note was a part of a sum agreed on by the parties and settled on as the amount due from defendant to plaintiff, that the amount was paid in the manner therein set forth (though bad for failing to aver that the payment was made before the suit was brought) is not open to demurrer that it is double, or that it does not show the fact from which the indebtedness rose, or does not show that the order on a third person as set forth in the plea was given in payment of the note.

6. *Accord and Satisfaction; Validity.*—A parol agreement on the part of a creditor to accept a less sum than the real debt followed by the payment of the debtor of that sum, concerning which there is no dispute, is nudum pactum.

7. *Same; Plea; Sufficiency.*—As a defense to an action on a note a plea which alleges that the note was a part of the indebtedness due from the one party to the other, that subsequent to the execution of the note, the parties compromised in which it was agreed that in settlement of the amount due the creditor would accept a less sum and that thereupon the debtor paid to the creditor such less sum, and the creditor executed a receipt acknowledging payment in full, etc., fails to allege a valid consideration for accepting the less sum in satisfaction of the amount claimed, and is therefore, demurrable.

APPEAL from Coffee Circuit Court.

Heard before Hon. H. A. PEARCE.

Action on a promissory note by T. J. Scott & Sons against Rawls & Rawls. From a judgment for defendant, plaintiffs appeal. Reversed and remanded.

The pleas to which demurrers were interposed and overruled by the court are as follows:

Plea 3: "Defendants, as a further defense, aver that said note sued on was a part of the total sum of \$2,250, agreed upon by plaintiffs and defendants, and settled upon as the amount to be due and paid to plaintiff by defendants, and that this amount was paid, and was a settlement in full of the said note, and all claims held

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against the defendants, including said note sued on; that the sum of \$2,250 was paid by one R. Tillis to plaintiffs upon the written order of defendants, and the said plaintiffs gave their receipt upon such payment to R. Tillis, for defendants, for the sum of \$2,250 in full settlement of said note, with all amounts due to them by defendants, and thereupon plaintiffs promised and agreed to surrender and send to defendants their said note." The following demurrers were interposed to plea 3: "(1) Said plea does not show in what way, nor allege the facts from which, said indebtedness arose, nor allege how the note sued upon was a part of said \$2,250, whereby it can be seen that the payment of the \$2,250 was a payment of said note. (2) Said plea is double, in that it alleges a settlement of said note by payments, and also alleges a payment by a written order by defendant upon R. Tillis. (3) Said plea does not show that the order upon R. Tillis for the said \$2,250 was given for the payment of the note sued on. (4) For aught that appears in said plea, the receipt given to R. Tillis by the plaintiff's was without consideration."

Plea 1a: "That they do not, and did not at the commencement of the suit, owe the demand sued on, or any portion thereof." The demurrers interposed to this plea were as follows: "(1) The same alleges a mere legal conclusion. (2) The same does not allege any act showing that they do not owe the note sued upon."

Plea 3a: "That the note sued on is based upon the following consideration: Plaintiffs, T. J. Scott & Sons, had performed certain work for defendants, and agreed to do certain other work for defendants in connection with certain lands situated in Choctaw county, Ala., for which defendants agreed to pay plaintiffs the sum of \$2,250. Subsequent to said agreement, on, to wit, the 19th day of February, 1901, defendants executed to

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plaintiffs the note sued on for that portion of said \$2,250 upon the request of plaintiffs, and their representation to defendants that they needed some money and wanted defendants' note for \$500 to enable them to procure some money; that subsequent to the execution of said note, on, to wit, the 20th day of February, 1901, defendants and plaintiffs entered into an agreement of compromise and settlement with plaintiffs, whereby and wherein it was agreed that plaintiffs would accept in full and complete settlement and satisfaction of the total amount of \$2,250 as aforesaid, which included the said notes so given, the sum of \$1,750; and that thereupon defendants paid to plaintiffs the said sum of \$1,750, and plaintiffs thereupon executed and delivered to defendants their receipt in writing, which receipt was and is in the following words and figures, to wit: 'Montgomery, Ala., Feb. 20, 1901. Received from R. Tillis, for Rawls & Rawls, \$2,250 in full for commissions as per agreement in Roseberry-Spencer sale of Choctaw county lands. T. J. Scott & Sons.' And defendants aver that it was the agreement of the parties, and said receipt was given and intended as full satisfaction of the said sum of \$2,250, including said note, wherefore and whereby, they say, said note was paid in full." The demurrers interposed to this plea are as follows: "(1) Said plea does not allege any fact showing a valid consideration for accepting a less sum than \$2,250, or for releasing defendants from the payment of said note. (2) The facts alleged in said plea do not show a payment in law of the note sued upon. (3) Said plea does not show that any part of the \$1,750 so paid was applied upon or intended by the parties thereto as a payment of the note sued upon. (4) The receipt shown by said plea does not purport to be an instrument executed between plaintiffs and defendants, and the facts set out in the plea

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do not show any consideration for plaintiffs' agreeing to accept a less amount than \$2,250, which said plea confesses the defendants to have owed the plaintiffs, and neither does said plea aver that the said \$1,750 were applied or directed to be applied by the defendants as a payment of the note sued upon. (5) The facts alleged in the plea do not show that defendants were parties to said receipt, nor is it averred that R. Tillis acted as the agent of said defendants in receiving said receipt. (6) It appears from said plea that the plaintiffs have only paid \$1,750 upon a debt of \$2,250, and it fails to aver that any part of said sum was applied or directed to be applied upon the notes sued upon."

It is unnecessary to set out plea 5. The note which is the subject of the suit is for \$500, and the contention of the defendants is that the payment made by Tillis was in full of all demands including the note sued on. It seems from the evidence that, while the receipt given to Tillis recited a payment of \$2,250, the facts were that Tillis only paid \$1,750.

ESPY & FARMER, for appellant. A verbal contract on the part of a creditor to accept less than the face value of his debt from his debtor is a nudum pactum, and cannot be enforced.—*Singleton, et al. v. Thomas*, 73 Ala. 205; *Hodges v. Tenn. Imp. Co.*, 123 Ala. 572; *Hand Lbr. Co. v. Hall*, 41 South. 78. The exceptions are stated in the following authorities.—*Hand Lbr. Co. v. Hall, supra*; Secs. 3973 and 3974, Code 1907 and citations. The effect of the testimony objected to was to add to or contradict the recitals of the notes and letters thereto attached.—*Drennen v. Satterfield*, 119 Ala. 84; *Avery v. Miller*, 86 Ala. 495; *Hunt's Case*, 96 Ala. 130; 17 Cyc. 659. Charge 3 requested by the plaintiff should have been given.—*Stegall v. Wright*, 143 Ala. 204; *Hodges v. Tenn. Imp.*

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Co. supra; *McArthur v. Dane*, 61 Ala. 539; *Singleton, et al. v. Thomas supra*. Counsel discuss the other charges given and refused, but without citation of authority.

H. L. MARTIN, and M. SOLLIE, for appellee. No brief came to the Reporter.

DOWDELL, J.—The complaint is on a promissory note. The defendant filed eight pleas. Demurrers were interposed to pleas numbered 3 ,5, 1a, and 3a, which were overruled by the court. These rulings are here separately assigned as error.

Plea 1a is neither in form nor substance the general issue. It merely states as a conclusion of the pleader that the defendant does not owe the demand sued on, without the statement of any facts. Under this plea, if the plaintiff should be forced to join issue on it, the defendant might offer evidence of matter in support of the same, as that of failure of consideration, or payment, which should be specially pleaded, and to which the plaintiff would be entitled to specially reply. The plea fails to inform the plaintiff of what he is to meet, and is therefore bad, and subject to demurrer. Plea numbered 1, to which a demurrer was overruled is subject to like criticism; but this ruling is not assigned as error.

Plea No. 3 as a plea of payment has its infirmities, but is not open to any of the grounds of demurrer assigned. It fails to aver that the payment was made before suit commenced.

Plea 3a, when construed, as the rule requires, most strongly against the pleader, is subject to the demurrer interposed. This plea by its averments sets up as a defense a parol agreement on the part of the creditor to accept, and the payment by the debtor of, a less sum

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than the real debt, concerning which there was no dispute, and which the plea admits. The rule is well settled in this state that such an agreement is nudum pactum.—*Singleton v. Thomas*, 73 Ala. 205; *Hodges v. Tenn. Implement Co.*, 123 Ala. 572, 26 South. 490; *Hand Lumber Co. v. Hall*, 147 Ala. 561, 41 South. 78, The plea on its face confesses that the receipt set out in the plea does not speak the truth. While the receipt recites the payment of \$2,250, the plea admits in fact only \$1,750 was paid. There was no dispute or controversy about the indebtedness of \$2,250. The note sued on, it is admitted, represented in part this debt; that is, to the extent of \$500. The note was not surrendered upon the giving of the receipt, though it is averred in the plea that there was an agreement to surrender it, which, however, was a mere verbal agreement. Under these facts we are unable to discover anything more than a simple verbal agreement to accept a less sum than the amount of the debt in payment of the same, which was without any consideration to support it, and consequently nudum pactum.

The assignment of error in reference to the ruling on the demurrer to plea No. 5 is not insisted on, and hence we do not consider it.

There are other assignments of error, but what we have said above as to the rulings on the pleadings sufficiently indicates the errors committed, and will prove a sufficient guide on another trial.

For the errors indicated, the judgment is reversed, and the cause is remanded.

Reversed and remanded.

TYSON, C. J., and ANDERSON and McCLELLAN, J.J., concur.

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Carroll v. Burgin, et al.*Action for Breach of Sheriff's Bond.*

(Decided Jan. 15, 1909. Rehearing denied Feb. 18, 1909.
48 South. 667.)

1. *Sheriff and Constable; Liability on Bond; Defenses.*—Where the only damage claimed is the loss of the property which is held by a defendant in detinue who was cast in the suit and who after the termination of the litigation tendered the property to a deputy sheriff, who refused to receive it, whereby the property was lost to the plaintiff, in an action on the bond of the sheriff for the recovery of the value of the property, the fact that the defendant tendered the property to the plaintiff after he had tendered it to the deputy, and the plaintiff refused to receive the property, may be shown in defense of such action.

2. *Same; Termination of Office.*—A sheriff does not breach his bond by refusing to receive property tendered by a defendant in detinue holding under a forthcoming bond, and cast in the suit, after his term of office had expired.

3. *Same; Defenses.*—The fact that the defendant in detinue offered to deliver the property to an attorney of record for the plaintiff and that he refused to receive it, is not a defense to an action on the sheriff's bond since by the terms of the bond the defendant was bound to deliver it to the plaintiff.

APPEAL from Bessemer City Court.

Heard before Hon. WILLIAM JACKSON.

Action by W. C. Carroll against J. B. Burgin and others, sureties on his official bond as sheriff, to recover the value of the property recovered by plaintiff in a detinue suit, which was alleged to have been lost to plaintiff by the refusal of his deputy to receive it. From a judgment for defendant plaintiff appeals. Reversed and remanded.

PINKNEY SCOTT, for appellant. The court erred in overruling the demurrer to the 2nd plea.—*Brewster v. Gavin*, 127 Ala. 319; *Ryan v. Couch*, 66 Ala. 249. The demurrers to the 5th plea should have been sustained.—Sec. 1479, Code 1896; *Jesse French P. & O. Co. v. Brad-*

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ley, 143 Ala. 535; *Ryan v. Couch*, *supra*. After the bond has been executed to the sheriff it was in the custody of the law.—*Gordaman v. Malone*, 63 Ala. 559; *Kemp, et al. v. Porter*, 7 Ala. 138; see generally on this subject.—*Gary v. The Bank*, 11 Ala. 774; *Evans v. The Governor*, 18 Ala. 662. The court erred in overruling demurrer to the 6th plea.—Authorities *supra*. Counsel discuss other assignments of error, relative to pleading and evidence, but without further citation of authority.

TILLMAN, GRUBB, BRADLEY & MORROW and CHARLES E. RICE, for appellee. The 2nd plea was good under the terms of the statute.—Sec. 3783, Code 1907. The demurrer to the 6th plea was properly overruled.—28 A. & E. Ency of Law, p. 36, and authorities cited. Counsel discuss other assignments of error, but without further citation of authority.

SIMPSON, J.—The suit in this case was brought by the appellant against the appellees, as principal and sureties on the bond made by said Burgin as sheriff of Jefferson county. The breaches of the bond alleged relate to a suit in detinue for the recovery of two mules, commenced September 27, 1906. The property sued for was taken into the custody of the sheriff, and on October 3, 1906, delivered to the defendant on the execution of a forthcoming bond. On December 13, 1906, judgment was rendered for the plaintiff. It is assigned as a breach of the condition of the bond of said sheriff that "he failed to accept the property from the said James Barbour, the defendant in said detinue suit, the same having been tendered to Rush Randall, deputy sheriff, and acting for him, within 30 days from the rendition of the judgment against the defendant as aforesaid, and restore the property to the plaintiff, as it was his duty to do."

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The second plea set up the fact that "said Andrew W. Burgin was not sheriff of Jefferson county at the time of the alleged breach of said official bond." Demurrers were interposed to said second plea, and overruled.

The first assignment insisted on is to the overruling of said demurrer, and it is contended that said plea is not a sufficient answer to said count. The cases relied upon for this contention are *Bruister v. Garin et al.*, 127 Ala. 317, 28 South. 410, and *Ryan v. Couch*, 66 Ala. 244. In those cases it was held that a sheriff who had levied a writ of attachment, and to whom a venditione exponas had been issued, was the proper party to make the sale, even though his term of office had expired; and the same principle was applied where the sheriff had, during his term of office, levied an execution. The reason upon which these decisions rest is that "by the levy of the writ upon chattels the officer acquires a special property therein" (*Bruister Case*, 127 Ala. 319, 28 South. 410), or that "he acquired a special property in the personal property levied on under the writ" (*Ryan Case*, 66 Ala. 249). That principle has no application to the present case, in which the property had been turned over to the defendant in the case, on the execution of a bond according to section 3778, Code of 1907, under which it was his duty, if he was cast in the suit, to "within 30 days deliver the property to the plaintiff" and pay his costs, etc.; and, if he failed to do so, the only duty of the sheriff was to "upon the bond make return of the fact of such failure."—Section 3783, Code of 1907. This bond was simply one of the papers which it was the duty of the retiring sheriff to turn over to his successor.—Section 1540, Code of 1907. When that was done, his responsibility ceased, and he had no right to receive the property. There was no error in overruling the demurrer to the second plea.

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The other breach of the bond insisted on is that the sheriff failed to accept the mules when tendered to his deputy by the defendant (the principal in the forthcoming bond), after judgment had been rendered in favor of the plaintiff, "wherefore the plaintiff lost said property." In reply to this defendant's fifth plea is "that the said Barbour (the defendant in detinue) tendered and offered to deliver said property to the plaintiff, after tendering the same to Rush Randall, and within 30 days from and after the rendition of said judgment in favor of the plaintiff against said Barbour, and that the plaintiff failed or refused to accept or receive the same." Appellant claims that it was the duty of the sheriff to receive the property and turn it over to him, and that it is no answer to the breach assigned to allege that the property was tended to the plaintiff within the time prescribed by the statute. It will be noticed that the only damage claimed is for the loss of the property. As before stated, the condition of the bond is that the defendant will "deliver the property to the plaintiff" (section 3780, Code of 1907); and, while it may be true that, if the property is tendered to the sheriff, it would be his duty to take it and turn it over to the plaintiff, it is difficult to see how the plaintiff could be damaged, in the loss of the property, by the sheriff's act, when the property was tendered to him in accordance with the conditions of the bond, and he refused to receive it. The case of *Jesse French, etc. Co. v. Bradley* was an action by a party who had given the bond to supersede an execution; the gravamen of the action being that the property was delivered or tended to the sheriff, and he, in place of returning that fact, as required by the statute returned the bond as forfeited in toto.—143 Ala. 530, 535, 39 South. 47. There was no error in overruling the demurrer to the fifth plea.

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The sixth plea offers, as a defense, the fact that the defendant in the detinue suit offered to deliver said property to Pinkney Scott as attorney for the plaintiff (he being the attorney of record for the plaintiff) within the 30 days prescribed by the statute, and that said Scott refused or failed to accept the same. This plea was demurred to, and the demurrer overruled. The insistence is that this was error, because the attorney was not obliged to receive the property for his client. While it is held that an attorney who sues for money due his client has authority to receive the money, and a tender to him is equal to a tender to the client (4 Cyc. 940, 947-949; 28 Am. & Eng. Ency. Law, 36; *Jackson v. Crafts*, 18 Johns, [N. Y.] 110; *Salter v. Shore*, 60 Minn. 483, 62 N. W. 1126; *Frazier v. Parks*, Adm'r, 56 Ala. 363), yet we cannot say that a tender to the attorney of property which the defendant had obligated himself to deliver to the client would satisfy the bond.

For the same reason, that part of the oral charge excepted to was erroneous.

The judgment of the court is reversed, and the cause remanded.

HARALSON, DOWDELL, and DENSON, JJ., concur.

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Breach of Contract.

(Decided April 6, 1909. 49 South. 308.)

1. *Contract; Vendor and Purchaser; Construction.*—Where the contract of the sale of land payable in notes providing that the vendor agreed to erect a frame building on the premises before a designated date, such contract required the furnishing by the vendor of the materials for the building.

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2. *Parties; Real Party in Interest.*—Under section 2489, Code 1907, an action for the breach of contract to erect a building on the premises sold need not be brought in the name of the real owner of the contract, but may be brought in the name of the original owner though the contract has been assigned.

3. *Assignment; Action on; Pleading.*—The assignment of a contract for the payment of money must be by endorsement to authorize an assignee to sue in his own name under section 876, Code 1896.

4. *Same; Real Parties in Interest.*—Where the contract was for the purchase and sale of real estate and bound the vendor to erect a building on the premises sold, and the purchaser assigned the contract, an action for its breach by the vendor in failing to erect the building must be brought in the name of the purchaser for the use of the assignee.

5. *Same.*—As a defense to an action by the purchaser for the breach by the vendor of a contract to construct a building on the premises, pleas setting up a defense that the purchaser was not at the commencement of the suit the beneficial owner of the demand sued on and that before the commencement of the suit he had assigned his rights to a third person who was the beneficial owner, show that the third person was the beneficial owner at the commencement of the suit and that the suit must be brought in the name of the purchaser for the use of such third person.

APPEAL from Marshall Circuit Court.

Heard before Hon. W. W. HARALSON.

Assumpsit by James R. Thomas against D. P. Bohanan. For a judgment for plaintiff, defendant appeals. Reversed and remanded.

The action was for breach of the following contract:

"September 22, 1902. This agreement, between D. P. Bohanan, of the first part, and J. R. Thomas, of the second part, witnesseth: That the said D. P. Bohanan has sold to said Thomas 80 acres of land (here follows the description) for the sum of \$648, to be paid in notes. D. P. Bohanan does agree to erect one boxed plank, 16x-24 ft. house, with shed room on back side; said building to be covered with board, and floored with rough lumber; said building to be erected by the 25th day of December 1902, unless other agreement shall be made.

"September 22, 1902. Received of J. R. Thomas \$50, in payment of land note."

The follows:

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"The plaintiff failed to provide the material necessary to build said house."

Plea 7: "Plaintiff is not, and was not at the commencement of this suit, the beneficial owner of the demand sued on, which is evidenced by the contract in writing, and defendant makes oath that this plea is true."

Plea 8: "That plaintiff is not now, and was not at the commencement of this suit, the owner of the demand sued on; but that before the suit was commenced he had assigned all his rights in and to the demand sued on to one Hood, and that said Hood was at the commencement of this suit, and is now, the beneficial owner of the demand sued on, and said contract is evidenced by the contract in writing."

Pleas 7 and 8 were duly verified by the affidavit of the defendant.

The demurrers to pleas 7 and 8 are: "(1) Because the contract is not one on which the assignee could maintain a suit. (2) The transfer or assignment would not deprive the plaintiff of his right to sue, and the plaintiff is the only person who can maintain the suit. (3) The plea does not aver that the assignment or transfer was before the commencement of the suit."

STREET & ISBELL, for appellant. The court erred in sustaining demurrer to plea 5.—16 Cyc. 535; 11 A. & E. Ency of Law, 253; 4 A. & E. Ency of Law, 992; All Standard Dictionaries on the word, "erect." The court erred in its ruling on pleas 7 and 8.—Sections 28 and 876, Code 1896; 2 A. & E. Ency of Law, pp. 1016 and 1088; 4 Cyc. pp. 20, 91, and 96; 2 Mayf. Dig. 224.

JOHN A. LUSK, for appellee. The court properly overruled the demurrer to plea 5. In any event, the action

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was without injury as the defendant received the benefit of plea 5 and 6.—2 Mayf. Dig. 176. The contract sued on is not governed by sections 28 or 876, Code 1896, but are governed by the principles laid down in *Sneed v. Bell*, 142 Ala. 449. The bond for appeal from the justice court was conditioned as required by section 482, Code 1896.—*Neff v. Edwards*, 81 Ala. 246; *Mount v. Stewart*, 86 Ala. 365.

ANDERSON, J.—We are of opinion that the contract, as set out in the complaint, placed the duty upon the defendant of furnishing the material for the house, and that the demurrer to the fifth plea was properly sustained, as it did not answer the complaint.

The contract, set out in the complaint, was not such a one as required the suit brought in the name of the real owner under the terms of section 28 of the Code of 1896 (section 2489 of the Code of 1907). Nor did pleas 7 and 8 bring the suit within the provision of section 876 of the Code of 1896. Conceding, without deciding, that the contract was such an instrument that an assignment thereof, by indorsement, would authorize the bringing of a suit thereon by the assignee, the pleas do not aver that it was assigned by indorsement, as is required by the statute.—*Sneed v. Bell*, 142 Ala. 449, 38 South. 259.

While the contract set out is not such a one as authorizes suit, under the statute, in the name of the beneficial owner, and the pleas do not bring it within the influence of section 876 of the Code of 1896, yet pleas 7 and 8 do aver that Hood became the real owner before the commencement of the suit. This being true, the suit should be in the name of the present plaintiff, but for the use or benefit of Hood. The assignment, if made for a valuable consideration, passed the equitable title to Hood,

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vesting in him the exclusive right to the use of the name of the assignor in suing upon the contract. If the contract was assigned, the suit should be in the name of the present plaintiff for the use or benefit of Hood.—*Johnson v. Martin*, 54 Ala. 271, and cases there cited.

In the case of *Wolffe v. Eberlin*, 74 Ala. 99, 49 Am. Rep. 809, a demurrer to a plea almost similar to pleas 7 and 8 in the case at bar was sustained; but a careful consideration of this case discloses that the plea did not aver that the assignment was made before the suit was brought, and the opinion stresses this fact.

Pleas 7 and 8 were not subject to the grounds of demurrer assigned thereto, and the judgment of the circuit court is reversed, and the cause is remanded.

Reversed and remanded.

DOWDELL, C. J., and McCLELLAN, MAYFIELD, and SAYRE, JJ., concur.

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Breach of Contract.

(Decided April 9, 1909. 49 South, 228.)

Sales; Breach by Buyer; Measure of Damages.—The measure of damages for the breach by the buyer of an executory contract for the sale of hosiery yarns entered into with the manufacturers of yarn, is the difference between the contract price and the market value of the yarn at the time and place of the breach, the yarn not being manufactured expressly for the buyer, and the seller not having to carry over for the season any manufactured yarns by reason of the breach.

APPEAL from Tuscaloosa County Court.

Heard before Hon. H. B. FOSTER.

Action by the Gate City Cotton Mills against the Rosenau Hosiery Mills for the breach of an executory

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contract for the sale of hosiery yarns. Judgment for plaintiff and on motion of defendant an order was entered granting defendant a new trial. From this order plaintiffs appeal. Affirmed.

DANIEL COLLIER, and R. H. SCRIVNER, for appellant. This appeal is taken under section 2846, Code 1896. On the original trial the court did not err in its instructions as to the measure of damages.—*Bonifay v. Hassell*, 100 Ala. 269; *Peck v. Heifner*, 136 Ala. 374 1-2 24 A. & E. Ency of Law, 1116; *Gardner v. Decd*, 4 L. R. A. 740; 35 Cal. 299; Paige on Contr. sec. 1599; 13 Cyc. 159; *Hinkley v. Bessemer*, 121 U. S. Therefore, it follows that the court erred in granting a new trial.

FOSTER & OLIVER, for appellee. Under the facts in this case, the court erred in its oral charge as to the measure of damages, and therefore, properly granted a new trial.—*Penn v. Smith*, 93 Ala. 476; s. c. 98 Ala. 560; *Watson v. Kirby*, 112 Ala. 436; 13 Cyc. 73; *Southern Cotton Oil Co. v. Heflin*, 99 Fed. 339; *Johnson v. Allen*, 78 Ala. 287; *McFadden v. Henderson*, 128 Ala. 233.

DENSON, J.—Gate City Cotton Mills, plaintiff in this action, was engaged in manufacturing cotton yarns in the city of Atlanta, Ga., and defendant, Rosenau Hosiery Mills, was engaged in manufacturing hosiery in the city of Tuscaloosa, Ala. On the 31st of August, 1904, defendant purchased of the plaintiff 50,000 pounds of white hosiery yarns, to be shipped to defendant at intervals between September, 1904, and January 1, 1905, as the defendant might designate, and at a fixed price. Nearly 15,000 pounds of the goods were shipped to, accepted by, and paid for by, the defendant, when the defendant, claimed that the yarns so received by it were of an inferior quality, declined to direct the shipment

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of any more, or to further carry out the contract. Hence this action by plaintiff for an alleged breach of the contract.

Only one question is presented by the record for determination. That question is: What is the proper rule for the admeasurement of damages for the breach of the contract? In the court below the plaintiff contended the true rule to be the difference between the cost of the manufactured articles and the contract price, while the defendant's contention was that the difference between the contract price and the market value of the articles furnished such rule. The court, on the trial, adopted the plaintiff's view, and in effect so charged the jury at the written request of the plaintiff; but after verdict and judgment for the plaintiff, and on motion of the defendant for a new trial, the court reached the conclusion that it had committed error, prejudicial to the defendant, in adopting plaintiff's view of the measure of damages, and granted defendant a new trial. It is from the order granting the new trial that this appeal is taken.

The evidence, without conflict, showed that plaintiff did not manufacture any specific yarns for the defendant, but, during the whole period covered by its contract with the defendant, manufactured a sufficient quantity of yarns to supply all of its customers, "and in that way always had enough yarns to ship defendant on the contract at any time it might order them; that it did not have to hold or carry over any yarns on account of defendant's failure or refusal to carry out its contract, but sold all the yarns it made during the season to other customers." There was also evidence which tended to show a decline in the price of yarns, after the contract was entered into and before the 1st day of January, 1905.

The action, as we have seen, is for the breach of an executory contract, in that defendant refused to accept or

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receive the goods purchased. The evidence clearly and without conflict shows that the goods had a market price at the place of sale, as well as such at the place of delivery, and that they were readily marketable; and, under the evidence cited above, we do not comprehend why the difference between the contract price and the market price would not fully compensate plaintiff for being deprived of the benefits of the contract, nor why it should not be the true rule for the admeasurement of plaintiff's damages. On the breach of a contract of executory sale by the vendee, in a refusal to receive the property, the vendor's measure of damages, generally, is the extent of his actual injury, which ordinarily is the difference between the contract price and the market value at the time and place of the breach. This rule was in effect adopted in the case of *Penn & Co. v. Smith, Granger & Cantrell*, 93 Ala. 476, 9 South. 609; and we do not see any difference of principle between that case and the case in judgment.

Consequently the court holds that the trial court committed reversible error in giving the charge requested by the plaintiff, and properly corrected the error by granting the new trial to the defendant.—*Penn & Co. v. Smith, Granger & Cantrell*, *supra*; *McFadden v. Henderson*, 128 Ala. 233, 29 South. 640; *Unexcelled, etc., Co. v. Polites*, 130 Pa. 536, 18 Atl. 1058, 17 Am. St. Rep. 788; *Funke v. Allen*, 54 Neb. 407, 74 N. W. 832, 69 Am. St. Rep. 716; Benjamin on Sales (6th Ed.) pp. 743-745.

The facts of the cases cited by appellant's counsel differentiate those cases from the one at bar and show their inapplicability as authorities on this occasion. The order granting the new trial will be affirmed.

Affirmed.

DOWDELL, C. J., and SIMPSON and MAYFIELD, J.J., concur.

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Attachment.

(Decided Feb. 4, 1909. 49 South. 83.)

Partnership; General Issue; Admissions.—Where the action was against an entity described as a partnership and the defendant appeared by counsel and interposed the plea of the general issue, it amounted to an admission of the partnership character and relieved plaintiff of the necessity of proving it.

APPEAL from Selma City Court.

Heard before Hon. J. W. MABRY.

Action by J. Marx & Co., against J. A. Shuttleworth & Co., begun by attachment. From a judgment for plaintiff defendants appeal. Affirmed.

PETTUS, JEFFRIES & PETTUS, for appellant. The court erred in sustaining demurrer to appellant's plea in abatement as amended.—*L. & N. R. Co. v. Steiner & Lobman*, 128 Ala. 354; *L. & N. R. Co. v. Dooley*, 78 Ala. 524; *A. G. S. v. Chumley*, 92 Ala. 317; *L. & N. R. Co. v. Nash*, 118 Ala. 477; *Exchange Bank v. Clements*, 109 Ala. 280; *Penoyer v. Neff*, 95 U. S. 714; *Haddock v. Haddock*, 201 U. S. 577. The states have a right to execute, and construe their own attachment laws and such laws govern.—*Greed v. Bushkirt*, 18 Law Ed. 599; *French v. Hall*, 42 Am. Dec. 341; *Cronan v. Fox*, 15 Atl. 119. The agreed statement of fact does not make out a case for the appellee.—*Russell v. Bellinger*, 40 South. 132; *Mudge v. Threcatt*, 57 Ala. 1.

HENRY F. REESE, for appellee. The authority for this action is found in sections 295 subd. 1, and 2940, Code 1907. The matter could be reached by garnishment.—

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Archer v. Peoples Bank, 88 Ala. 249. Power over the person of the garnishee confers jurisdiction on the courts of the state where the writ issues and the general tendency of the cases makes the question, whether a non resident creditor could have maintained an action to recover the debt, the criterion of jurisdiction to garnish the debt.—*Harris v. Balk*, 198 U. S. 222; *Blackston v. Miller*, 188 U. S. 189; *L. & N. v. Beer*, *supra*. (Counsel cites a number of cases from other jurisdictions to sustain the foregoing proposition.) The appearance and the filing of the plea of general issue by the sole defendant is an admission of the partnership character of the defendant and relieves the plaintiff from having to prove that fact.—*Southern Ry. Co. v. Hundley*, 44 South. 95; *Zealy v. Birmingham Co.*, 99 Ala. 579; *Oxford v. Bradley*, 46 Ala. 98. The court is authorized to inspect the initial pleading to ascertain who is the party defendant.—*Simmons v. Sharpe*, 138 Ala. 451.

McCLELLAN, J.—Marx & Co., commenced this action against Shuttleworth & Co., a non-resident of the state of Alabama, by causing the issuance of an attachment, which took the form of a summons to A. A. Davidson and A. C. Thomas, both being residents of the state of Alabama, to answer as garnishees. Thomas, it appears, did not answer. Davidson's answer disclosed an indebtedness to the defendant, and he paid the sum, admitted to be due, into the court. The defendant (appellant) appeared specially and filed its plea to the jurisdiction of the court, alleging that its residence was in the state of Kentucky, that it had not been personally served with process, that Davidson was not possessed in Alabama of any effects of the defendant subject to attachment, that the indebtedness admitted in his answer was for goods sold and delivered to Davidson in Kentucky, that

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such debt was payable at Louisville, in that state, and not in Alabama, and that attachment had not been levied on any property of the defendant in Alabama. The plaintiff's (appellee's) demurrer to this plea was sustained, and the errors assigned on that ruling present one of the two legal inquiries to be determined.

The amended complaint, filed, without objection, after demurrer sustained, styles the action thus: "*J. Marx & Co. v. J. A. Shuttleworth & Co.*," and thereafter in the complaint these parties are referred to only as "plaintiffs" and "defendant." Counsel appeared and, subsequent to the amendment, filed a plea of the general issue for the defendant. The point is taken that, since no proof was made of the partnership character of the defendant the judgment is erroneous. If, to determine the capacity in which the defendant was impleaded, we may look to the affidavit for the writ (*Simmons v. Sharpe*, 138 Ala. 451, 35 South. 415), the defendant was sued as a partnership; and assuming that that capacity is imported, though not expressly averred therein, into the complaint as amended, we think that under the plea filed for the defendant the plaintiffs were relieved of the necessity of proving the capacity in which the defendant was sued. This is the rule prevailing as to corporations, and we see no good reason to deny its application to cases where the action is against an entity described as a partnership.—*Sou. Ry. Co. v. Hundley*, 151 Ala. 378, 44 South. 195. The Cases of *Mudge v. Treat*, 57 Ala. 1, and *Russell v. Bellinger*, 146 Ala. 679, 40 South. 132, cited for appellant, were instance where the liability of individuals alleged to compose a firm or partnership was sought to be established by reason of their averred connection with the firm or partnership. Here the action is against the entity as such, and does not seek a judgment in the

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first instance against the individuals composing the concern. The judgment is not subject to the objection stated.

All of the Justices, except the writer, affirm the ruling of the court below in sustaining the demurrer to the plea to the jurisdiction upon the authority of *Planters' Chemical & Oil Co. v. Waller & Co. Infra*, 49 South 89. The writer bases his opinion in affirmance of the ruling below on the plea to the jurisdiction upon the considerations to be stated.

An investigation of the decisions of this court will disclose that two views have either been declared or enforced with respect to the power of courts in this state to bindingly deal, by means of garnishment, with a debt due a non-resident, not personally served nor appearing, through an appropriation of that debt, and the consequent discharge of the original debtor, to the satisfaction of a demand of a creditor of such non-resident creditor. One of these theories proceeds on the idea that a debt has its situs, unless otherwise stipulated, at the domicile of the creditor, and hence, where the creditor is a non-resident, there could be no property of the non-resident creditor within this state subject to the control of our courts. The other theory, though not amplified in reason in the decision to be referred to, must necessarily proceed on the idea that jurisdiction of the court issuing the attachment, in the nature of garnishment, to appropriate, as before stated, the debt due to a non-resident creditor, is acquired by judicial power over the person of the garnishee (original debtor), upon the assumption that, for purposes of garnishment, such original debtor holds property of his non-resident creditor, and therefore jurisdiction of the garnishee draws to the court issuing the writ jurisdiction of his non-resident creditor to the extent of condemning the debt involved.

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The first state theory is supported by *L. & N. R. R. Co. v. Dooley*, 78 Ala. 525; *A. G. S. R. R. Co. v. Chumley*, 92 Ala. 317, 9 South. 286; *L. & N. R. R. Co. v. Nash*, 118 Ala. 477, 23 South. 825, 41 L. R. A. 331, 72 Am. St. Rep. 181. The case of *L. & N. R. R. Co. v. Steiner & Lobman*, 128 Ala. 353, 30 South. 741, is not applicable to the case at bar, in the light of either of the theories stated, for the reason that there the garnishee was brought within the jurisdiction of the court. However, it might be argued, with some show of plausibility, that this case reaffirms the broad doctrine of the *Dooley Case* and its successors. The second stated theory is supported by our case of *Ga. & Ala. R. R. Co. v. Stollenwerck*, 122 Ala. 539, 25 South. 258. There the garnishee was correctly held to be an Alabama corporation, though also chartered in Georgia; but the defendant Smith was a non-resident, and the court affirms the debt to Smith to have been subject to garnishment, notwithstanding the debt may have been created in another state, and notwithstanding Smith may have been a non-resident of Alabama. It is true that immediately following this ruling the court declares the doctrine of situs of a debt as that doctrine is announced in the *Dooley, Chumley, and Nash Cases*, *supra*, and also cites *E. T. V. & G. R. R. Co. v. Kennedy*, 83 Ala. 462, 3 South. 852, 3 Am. St. Rep. 755. In the opinion in this last-named case it is said that "debts have no local situs, but are suable in any country or locality where the debtor's person may be found." The quoted expression is criticised in *Chumley's Case*, and is there interpreted to mean no more than that debts "have no locality as to suability." It is apparent, as is said in the note to *Goodwin v. Clayton*, 67 L. R. A., at page 217, that the ruling in *Stollenwerck's Case*, declaring the right to subject, by garnishment, the debt due the non-resident creditor, not appearing nor personally

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served, is a non sequitur from the doctrine affirmed as upon the authority of the *Dooley* and *Chumley Cases*.

It is thus seen that with us the general doctrine that personal property has its situs at the domicile of the owner—the creditor—has an exception ingrafted upon it if the *Stollenwerck Case* is sustained, because, in the absence of appearance by a nonresident, or of personal service on him, jurisdiction to deal with the property in any court of a nonresident can only be acquired by lawfully secured control over property belonging to him. Reconciliation of these divergent theories, before stated, is obviously impossible, and to the one or the other this appeal compels a declaration of the adherence of this court. In this state of the law as pronounced by this court, counsel for appellees insists that we should adopt the latter theory, especially in view of the fact that the Supreme Court of the United States, in *Harris v. Balk*, 198 U. S. 245, 25 Sup. Ct. 625, 49 L. Ed. 1023, following the principle declared by that court in *C. R. I. & P. Ry. v. Sturm*, 174 U. S. 710, 19 Sup. Ct. 797, 43 L. Ed. 1144, holds to the theory that jurisdiction of the property of a nonresident creditor is acquired, in garnishment proceedings, by service of that character of process on the original debtor, even when such debtor is merely temporarily within the jurisdiction of the court issuing the writ of garnishment; and, from this fact, counsel for appellees urge that justice and fairness to our own citizens, as well as the harmonious and nondiscriminate application of our attachment laws, demand the approval of this doctrine by this court, rather than a recurrence to the doctrine to be found announced in our *Dooley*, *Chumley*, and *Nash Cases*, *supra*. Counsel for appellant take the position that *Harris v. Balk*, *supra*, is, in fact, based upon the "full faith and credit" clause of the Constitution of the United States, and that the rul-

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ing is predicable only upon the Maryland attachment laws under which the character of assumption of jurisdiction present in the *Harris-Balk Case* is allowable, whereas under our status, in such cases, as applied in the *Dooley*, *Chumley*, and *Nash Cases*, an interpretation by which the courts of the United States are bound, garnishment is legally ineffective to subject a debt due a non-resident by reason of jurisdiction only, of our courts, over the debtor of that nonresident. We think this fairly states the contention of counsel for appellant, with an exception to be later mentioned.

We cannot concur in the view of counsel for appellant in their interpretation and in the effect of *Harris v. Balk*. Harris and Balk were residents of North Carolina, and Harris was indebted to Balk. Epstein, a resident of Maryland, was a creditor of Balk. Epstein, to collect his debt, sued Balk in Maryland, and a writ of garnishment was served on Harris, who was temporarily in Maryland. There was no personal service on or appearance by Balk. On the garnishee's answer admitting an indebtedness to Balk, the Maryland court condemned this debt to the satisfaction of Epstein's demand against Balk, and Harris paid the judgment. Subsequently Balk sued Harris, in the North Carolina courts, to recover the debt mentioned from Harris to him, and in defense thereof Harris pleaded his payment of this debt in obedience to the Maryland judgment. The Supreme Court of North Carolina held the plea unavailing, for the reason that the Maryland court acquired no jurisdiction to bindingly deal with the debt of Harris to Balk, since the situs of the debt was with Balk, the creditor, and hence that no property of Balk was, by the process of garnishment and its service alone on Harris, brought under the control of the Maryland court. It necessarily followed that the Maryland judgment pleaded was

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invalid. The case passing up to the Supreme Court of the United States, that court affirmed the jurisdiction assumed and acted on by the Maryland court, and held, as I understand the opinion, that garnishment was effectual to subject a debt due a nonresident of the state issuing the process, and the consequent discharge of the original debtor, where service of the writ could be had on the original debtor (garnishee); the controlling consideration being that Balk could have sued Harris, on his debt, in the Maryland courts, if personal service on him (Harris) could have been had. Necessarily that court, in sustaining the Maryland court's jurisdiction of Balk, affirmed the presence of property of Balk in the custody of Harris, his debtor; for it was by that means only that jurisdiction to bind Balk and to discharge his debtor, as was held, was acquirable. The affirmance of jurisdiction in *Stollenwerck's Case supra*, is referable to the same fundamental considerations controlling *Harris v. Balk*, since the only lead to that jurisdiction, as regarded Smith, the nonresident defendant, was service on his debtor, the railway company. The "full faith and credit" clause of the Constitution of the United States, requiring effect to be given, in each state, to the acts, records and judicial proceedings of every other state, when properly authenticated under act of Congress, is conditioned for application upon jurisdiction of the court rendering the judgment of the parties and subject-matter.—*Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565. Hence a primary inquiry, when that provision of the Constitution is sought to be availed of in respect of a judgment, is the essential and stated jurisdiction vel non of the court rendering the judgment. This being true, the court, in *Harris v. Balk*, was invited and required to determine the very question now under consideration, in order to decide whether the Maryland

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judgment should have been given "full faith and credit" by the North Carolina courts.

What is the result to be anticipated from *Harris v. Balk*? It is that this court, when a judgment of another state on garnishment is pleaded in bar of a recovery in our courts, must apply the law thereto in consonance with its announcement in *Harris v. Balk*; for that court is the final arbiter of questions pertaining to the "full faith and credit" clause of the Constitution. So, yielding to the superior authority in a case presenting that status, shall we stop there and yet continue to adhere to a theory of the law in this regard that, in its practical application, closes our courts to the suitor entitled to invoke their powers against a nonresident creditor whose debtor is within the process power of our tribunals and thereby sanction, whether the necessity be well or ill created, of discrimination in favor of persons holding judgments of other states and against those for whose benefit our courts are maintained? Such a course would be inexcusable in its inequality of effect and indefensible in its lead to two utterly inconsistent applications of the law of attachments; and since our statutes granting the remedy of attachment, embracing the levy thereof by garnishment, present no obstacle to the adoption of the theory and its consequences, approved in *Harris v. Balk*, I think we should do so without hesitancy, thus reaffirming *Stollenwerk's Case* in an essential feature of its ruling.

As indicated, the question with us is not one to be influenced by consideration of the familiar rule whereby the construction of a state's statutes, in respect of its attachment system, by the highest court thereof, binds the courts of the United States. The matter has passed that stage, and presents a condition to ignore which would necessarily place this court in the attitude of ig-

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noring the right of citizens of this state who may well expect its tribunals to conserve these rights by all means within the legitimate power of these tribunals. The cases of *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565, and *Haddock v. Haddock*, 201 U. S. 562, 26 Sup. Ct. 525, 50 L. Ed. 867, are not, in my opinion, opposed to *Harris v. Balk*, as seems to be contended for appellant. We have recently, in *De Armon v. Massey*, 151 Ala. 639, 44 South. 688, stated our view of the scope and effect of the holding, as at present important in *Pennoyer v. Neff*. That case decides the extent, if we may so state it, of the power of the court on jurisdiction only acquired by the subjection of property of a nonresident to the control of the court proceeding in the premises, viz., that the jurisdiction obtained can only warrant the condemnation of the property seized, but not the rendition of a personal judgment against the nonresident defendant who does not appear and who is not personally served within the state. It is evident that *Pennoyer v. Neff* while covering an only correlated field to that touched by *Harris v. Balk*, is rather supporting of the conclusion of the latter case on the idea that the seizure under attachment processes of property of a non-resident clothes the tribunal with the power to bindingly dispose of it. The case of *Haddock v. Haddock* involved the consideration of the marriage relation and jurisdiction acquired and exercisable by a state court in the rendition of a decree of divorce. Obviously the questions determined as upon that status could not have bearing upon the inquiries presented in *Harris v. Balk* or in the case at bar. In *Chicago R. I. & P. R. R. Co. v. Sturm*, *supra*, the predecessor, in the principle now important, of *Harris v. Balk*, and also in the latter case, this quotation from 2 Pars. Const. (9th Ed.) p. 739, is employed, viz.: "All debts are payable everywhere, unless there be some

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special limitation or provision in respect to payment; the rule being that debts as such have no locus or situs, but accompany the creditor everywhere, and authorize a demand upon the debtor everywhere."

The amended plea to the jurisdiction contains this averment: " * * * That the debt owned by said Davidson to defendants is payable to defendants at Louisville, in the state of Kentucky, and is not payable in the state of Alabama. * * *" In both the *Sturm* and *Harris v. Balk Cases* reference is made to the fact that the debts, respectively involved, were not affected by any special limitation or stipulation as to payment. Appellant's quoted averment is the basis for the contention, mentioned as not embraced in the general statement of appellant's insistence, that the qualification contained in the excerpt from Parsons employed in the *Sturm* and *Harris-Balk Cases* frees the case at bar from the influence of or control by those decisions. I construe the quoted averment to be merely that Davidson's debt to appellant was payable in Louisville, in the state of Kentucky. The latter phase of the averment, viz., that it was "not payable in Alabama," can only be taken as asserting the negative of the precedent allegation that it was payable in another state. This phase of the averment imports no intent of the parties, one a resident of this state, to deny to the other, a resident of Kentucky, recourse by right to the courts of this state to enforce his demand. If such was the effect of the stipulation, it would probably be held invalid as against public policy.—9 Cyc. p. p. 510 et seq., notes 69, 70.

To determine the full effect of *Chicago Ry. v. Sturm* and *Harris v. Balk*, in respect of the qualification upon which counsel for appellant relies, it is necessary to consider whether, notwithstanding the qualification stated, and, it may be said, reinforced by negation, in the opin-

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ions in each case, of any special limitation as to payment of the debt there in question, the reasoning set forth, as well as the conclusion attained, do not eliminate the qualification as a factor in casting the decisions. If the controlling consideration in those cases is, in principle, independent of the qualification stated, I think, responding as must be done to the necessity to now decide the question, that the qualification should be ignored.

In the *Sturm Case*, where the debt was payable generally, without special limitation, it was said: "The essential service of foreign attachment laws is to reach and arrest the payment of what is due and might be paid to a nonresident to the defeat of his creditors. To do it he must go to the domicile of his debtor, and can only do it under the laws and procedure in force there. This is a legal necessity, and considerations of situs are somewhat artificial. If not artificial, whatever of substance there is must be with the debtor. He and he only has something in his hands. That something is the res, and gives character to the action as one in the nature of a proceeding in rem. * * * To ignore this is to give immunity to debts owed to nonresident creditors from attachment by their creditors, and to deny necessary remedies. A debt may be as valuable as tangible things. It is not capable of manual seizure, as they are; but no more than they can it be appropriated by attachment without process and the power to execute process. A notice to a debtor must be given, and can only be given and enforced where he is. * * * The proposition that the situs of a debt is where it is to be paid is indefinite." After quoting the aforesaid excerpt from 2 Parsons, the opinion proceeds: "The debt involved in the pending case has no 'special limitation or provision in respect to payment.' It was payable generally, and could have been sued on in Iowa, and therefore was at-

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tachable in Iowa. This is the principle and effect of the best-considered cases—the inevitable effect from the nature of transitory actions and the purpose of foreign attachment laws, if we would enforce that purpose.”

Bearing in mind that the present inquiry is not concerned with the law controlling the rights of the parties under their contract, as these rights may be affected by the interposition therein of the law of the place of performance of the contract or by special stipulation that the laws of a given state or country shall apply thereto, the writer can interpret the *Sturm Case* as affirming the legal test of the right to garnish the debtor, within the process power of the court, of a nonresident creditor to be whether such creditor could sue and obtain service upon his debtor in the state from the courts of which the process of garnishment emanates. That test does not, cannot, except arbitrarily, include as a sequence, operating as a condition precedent to the subjection and appropriation of the debt, the place of payment of the debt, for the reason that the courts of all the states are open for the institution of transitory actions therein, regardless of where the contract giving rise to the right to sue is to be performed, unless such contracts contravene the public policy of the state.

Harris v. Bulk is even more clear cut in the announcement of the fundamental doctrine we deduce from the *Sturm Case*. Therein it is said: “We do not see how the question of jurisdiction vel non can properly be made to depend upon the so-called situs of the debt or upon the character of the stay of the garnishee, whether temporary or permanent, in the state where the attachment is issued.—*Blackstone v. Miller*, 188 U. S. 189, 206, 23 Sup. Ct. 277, 47 L. Ed. 439. If, while temporarily there, his creditor might sue him there and recover the debt, then he is liable to process of garnishment, no matter

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where the situs of the debt was originally. We do not see the materiality of the expression 'situs of the debt,' when used in connection with attachment proceedings. If by situs is meant the place of the creation of the debt, that fact is immaterial. If it be meant that the obligation to pay the debt can only be inferred at the situs thus fixed, we think it plainly untrue. The obligation of the debtor to pay his debt clings to and accompanies him wherever he goes. He is as much bound to pay his debt in a foreign state, when therein sued upon his obligation by his creditor, as he was in the state where the debt was contracted. We speak of ordinary debts, such as the one in this case. It would be no defense in such suit for the debtor to plead that he was only in the foreign state casually or temporarily. His obligation to pay would be the same, whether he was there in that way or with an intention to remain. It is nothing but the obligation to pay which is garnished or attached. This obligation can be enforced by the courts of the foreign state after personal service of process therein, just as well as by the courts of the domicile of the debtor. * * * We can see no reason why the attachment could not be thus laid, provided the creditor of the garnishee could himself sue in that state and its law permitted the attachment. There can be no doubt that Balk, as a citizen of the state of North Carolina, had the right to sue Harris in Maryland to recover the debt which Harris owed him. Being a citizen of North Carolina, he was entitled to all the privileges and immunities of citizens of the several states, one of which is the right to institute actions in the courts of another state. * * * The case [having reference to the *Sturm Case*] recognizes the right of the creditor to sue in the state where the debtor may be found, even if but temporarily there, and upon that right is built the further right of the creditor to attach the debt

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owing by the garnishee to his creditor. The importance of the fact of the right of the original creditor to sue his debtor in a foreign state, as affecting the right of the creditor of that creditor to sue the debtor or garnishee, lies in the nature of the attachment proceeding. The plaintiff, in such proceeding in the foreign state, is able to sue out the attachment and attach the debt from the garnishee to his (the garnishee's) creditor, because of the fact that the plaintiff is really in such proceeding a representative of the creditor of the garnishee, and therefore, if such creditor himself had the right to commence suit to recover the debt in the foreign state, his representative has the same right, as representing him, and may garnish or attach the debt, provided the municipal law of the state where the attachment was sued out permits it."

Comment could add nothing to the clearness of the announcement in the quotation just made that the non-resident's right to sue his debtor within the process power of the foreign (to the creditor) state determines the jurisdiction of that state's court to condemn the debt and discharge the debtor, garnishee. In *Smith v. Gibson*, 83 Ala. 284, 3 South. 321, this court said: "The general rule is that every country has jurisdiction over all persons found within its territorial limits for the purposes of actions in their nature transitory. It is not a debatable question that such actions may be maintained in any jurisdiction in which the defendant may be found and is legally served with process. However transiently the defendant may have been in the state, the summons having been legally served on him, the jurisdiction of his person was complete, in the absence of a fraudulent inducement to same." This doctrine is approved in *Lee v. Baird*, 139 Ala. 526, 36 South. 720. So the appellant could have invoked the power of the

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courts of this state to enforce his demand against Davidson, since the action would have been transitory, unless the fact that the debt was payable in a foreign state (to Alabama) rendered the action local. We know of no authority giving such effect to such a provision for the performance of a contract for the mere payment of money. That character of action is necessarily deemed transitory.—8 Words & Phrases, p. 7072 et seq.

The whole theory, as is seen, of the *Sturm* and *Harris-Balk Cases* is that the debtor has the res, and that, if the nonresident creditor might have pursued him and might have reduced his claim to judgment, the creditor of that nonresident may likewise, by attachment, subject the debt. The res, property of the nonresident creditor, being so situate, with the debtor, jurisdiction of the person of the debtor (garnishee) raises the other and necessary jurisdiction to bind the nonresident creditor by the judgment, and, when paid by the garnishee, to discharge him. In 1 Wharton's Conflict of Laws (3d Ed.) pp. 801-803, treating the qualification under consideration, it is said: "The assumption of the Supreme Court, in the case in which the doctrine was first declared by it, that there was no 'special limitation or provision in respect to payment,' but the debt was payable generally, introduces a qualification, and suggests a distinction which it is difficult to follow through the cases. The difficulty arises from the fact that it is not always clear, when the court states that the debt was payable in a certain state, whether it is meant that it was expressly payable there, or by legal implication payable there. * * * It is difficult to perceive how the question whether the debt is payable generally or is expressly payable at some particular place outside of the state in which the garnishment proceeding is instituted can properly affect jurisdiction, since, in either case, suit

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may be maintained thereon (by the creditor to whom it is owing, at least) at the debtor's domicile. There is a tendency upon the part of the later cases to ignore the distinction, and apply the doctrine to debts expressly payable in another jurisdiction; and, in view of the broad ground upon which the decisions of the Supreme Court rest, it is doubtful if that court will adhere to the qualification when a case involving a debt expressly payable out of the jurisdiction in which it is garnished is presented." In the notes on the pages cited in Wharton will be found the cases bearing on the text.—*Harris v. Balk* was, apparently, not before the editor when the quoted text was written; and that case affirmatively declares that, under Maryland laws, the character, whether transient or permanent, of the presence of the debtor, within the jurisdiction issuing the writ of garnishment, is immaterial, thus eliminating from the text quoted from Wharton the indicated (if so) limitation that the creditor's suit could only be brought against his debtor at the debtor's domicile.

The most serious consideration that suggests itself as leading to a maintenance, in this character of inquiry of the distinction or qualification stated, is the inquiry: If the place of payment is expressly, by the contract, fixed in a foreign (to the state of the court issuing the writ of garnishment) state, would the subjection, through such garnishment proceeding, of the debt be, in practical effect, an unwarranted destruction of one provision of contract, namely, the stipulated right and assumed duty to pay the debt at a given place, as, of course, the parties may lawfully do? If the stated inquiry is given a negative reply, it must be upon the theory, announced in *Harris v. Balk*, that the plaintiff in the garnishment proceedings is the representative of the nonresident defend-

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ant, the creditor of the garnishee, and that acting for the defendant and in his stead in the collection of defendant's debt from the garnishee, to the end that that asset of the defendant should, in furtherance of the performance of the obligation of the defendant to pay his debt to the plaintiff, be applied to that purpose. The whole office of garnishment is to forestall the defendant's collection by him of the debt due him from the garnishee, and to apply it consistent with the defendant's obligation to satisfy the plaintiff's demand, is to anticipate the defendant by the judicial power to collect his debt from the garnishee and to deliver the proceeds to the defendant's creditor where a performance of his obligation would deliver it. In effecting this disposition of the debt due the defendant in the garnishment proceeding—a disposition entirely consonant with the defendant's duty to pay his debt to the plaintiff—the court enforces, never ignores, the *lex contractus*, controlling the rights of the parties, as distinguished from the *lex fori*, affecting the remedy merely; so that the real rights of the parties to the contract, between the garnishee and the defendant, are conserved, not sacrificed. Hence there is no escape from the conclusion that a stipulation for payment of the debt in a foreign state (to that issuing the process of garnishment) fulfills its entire legal purpose when it operates, if so in a given case, to subject the determination of the rights of the parties to that contract (between garnishee and defendant) to the law of the state in which the debt is expressly payable. In other words, unless the stipulation operates to clothe the contract with the law prevailing at the place of payment, and, if so, that law, if not contrary to the public policy of the state in which the garnishment proceeding is instituted, will be applied to the contract in the ascertainment and enforcement of the rights of the par-

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ties thereto, then the designated place of payment is unimportant; and so the substance of the inquiry in hand is resolved into this: May the plaintiff in garnishment proceeding select, by the institution of his action, the forum in which to enforce, as the representative of the defendant, the defendant's demand against the garnishee, the res, belonging to the defendant, being with the debtor (garnishee) within the jurisdiction and under the control of the court issuing the process?

Obviously the only effect of the institution of such proceeding by the plaintiff having any appearance of injury to the defendant is the fact that, if brought at the domicile of the garnishee, he could claim such exemptions, against his debtor, the defendant, as the laws there of allowed. Such laws have no extraterritorial effect and pertain to the remedy only.—*E. T. V. & G. R. R. Co. v. Kennedy*, 83 Ala. 462, 3 South. 852, 3 Am. St. Rep. 755. And, if the defendant was put to his direct action against his debtor, in the state of his (the debtor's) domicile, a like privilege to claim his exemptions would of course, be his. So that on the score of garnishment at the domicile of the debtor of the nonresident, there could be no prejudice to the nonresident creditor. Furthermore, and the inquiry suggests necessarily a negative response, may a nonresident creditor prevent the application, through process of garnishment, of his credits, his property, to the payment of his debt to the plaintiff in the proceeding in virtue of the fact that his debt from the garnishee is payable in a foreign state to that issuing process? If so he could, then garnishment as a remedy would in such cases wholly fail, because the writ could not be served on the garnishee, an essential to jurisdiction, at the place of payment. If so he could, the place of performance of a contract for the mere payment of money would control to deny jurisdiction in garnishment

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proceedings, notwithstanding the court issuing the process had jurisdiction of the debtor, with whom was the res belonging to the defendant, and this result seems to me to be squarely antagonistic to both the *Sturm* and *Harris-Balk Cases*.

These views, expressed at perhaps an inexcusable length, would affirm the judgment of the city court, and are necessarily opposed to the doctrine of the *Dooley*, *Nash*, and *Chumley Cases*. Yet these cases need not be pronounced unsound, but rather they should be departed from in the construction and application of our garnishment laws, for the reason that the necessity to so depart from their doctrine is in consequence of the ruling of the Supreme Court and the principle in the *Dooley*, *Nash*, and *Chumley Cases*, if assumed to be sound should yield to necessity.

There is no error in the record, and the judgment below is affirmed.

Affirmed.

TYSON, C. J., and DOWDELL, SIMPSON, ANDERSON, DENSON, and MAYFIELD, JJ., concur.

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Money Had and Received.

(Decided April 15, 1909. 49 South, 231.)

1. *Appeal and Error; Review; Case Tried Without Jury; Conclusions of the Court.*—Where a case is tried by the court without a jury and the facts are not agreed upon and no special finding of the facts is made or requested, the conclusions of the court on the facts cannot be reviewed by this court on appeal except for the purpose of determining whether or not the judgment rendered is supported by the evidence.

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2. Vendor and Purchaser; Money Paid Under Contract; Right to Recover.—Where a written proposition for the sale of lands provides that the property may be withdrawn unless the bid for the land is received by a certain date, the contract is withdrawn by its very terms where the money is not paid by the purchaser or the bid not made thereunder to the vendor or its agent until after the date specified; the contract is therefore void and not binding on the vendor, and could not be enforced against the vendor, thus rendering it not binding on the purchaser; and in the event money has been paid on it, the purchaser is entitled to recover the money.

APPEAL from Montgomery City Court.

Heard before Hon. A. D. SAYRE.

Action by Bessie K. Massie against Montgomery Lodge No. 596, Benevolent Protective Order of Elks, to recover \$500 paid on a real estate transaction not consummated. From a judgment for plaintiff, defendant appeals. Affirmed.

Plaintiff's contention is that under an agreement or option she paid the defendants by certified check, which was collected by them, the sum of \$500, and that the agreement was never consummated or conveyance made, as the defendant failed to furnish an abstract of title. The agreement referred to is as follows: "For and in consideration of the sum of \$500 to us in hand paid by Bessie K. Massie, the receipt whereof we do hereby acknowledge, we agree to sell to her our lot or parcel of land situated in the city and county of Montgomery, state of Alabama, on N. W. corner of N. Court street and Bibb street, said property being more fully described as follows: (Here follows the complete description.) Providing the said Bessie K. Massie pays to us the sum of \$17,700 within ten days from the receipt by her of an abstract of title to this property, which we hereby agree to furnish. If the title to said property is not satisfactory to the said Bessie K. Massie, then the aforesaid \$500 is to be returned to her. The said Bessie K. Massie shall have the right to assume a mortgage in the sum of \$11,000, now recorded against the said property, if she

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so desires." This agreement was signed by W. J. Tuttle and W. J. Osborne. The contention of the appellant is that the contract is stated in certain letters, which are as follows: "To Messrs. Dowdell & Joseph, City—Gentlemen: Subject to rejection or confirmation by the members of Montgomery Lodge No. 596, B. P. O. E., the governing board desires to submit the following proposition: The governing board will receive and recommend to the favorable consideration of the lodge a bid of \$18,200 net for the 100 feet of Elks' property (here follows the description of the property). If agreeable to the purchaser, instead of \$18,200 cash, he may offer to pay \$7,200 in cash and assume the \$11,000 mortgage now on this property, provided the mortgage can be induced to release his lien upon the undisposed part of the Elks' property; otherwise, payment must be \$18,200 cash. The purchaser must also pay the state, county, and city taxes for the current year, and accept a transfer of the policy of insurance, and prorate the premiums for the unexpired period. It is distinctly understood that the fixtures of every kind now in the building west of the stable are hereby reserved to the Elks. To receive consideration the bid must embody the foregoing terms, and must be accompanied by an unconditional certified check of \$500, which check is to be forfeited to the lodge of Elks in case the purchaser fails to comply with the terms of the bid. The purchaser must redate the abstract at his expense" and signed, "W. J. Tuttle, Exalted Ruler." The answer to the above is as follows, addressed to the lodge: "Referring to your letter of the 7th, offering to sell that portion of the Elks' lodge property for the sum of \$18,200 net, this proposition is hereby accepted, and also the conditions therein contained. We have this day deposited a check for \$500 in good faith with W. J. Tuttle, exalted Ruler"—and signed, "Dowdell & Joseph."

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GOODWYN & MCINTYRE, for appellant. Under the facts in this case the court would have been authorized to render a degree against Mrs. Massey, requiring her to take the property and to pay the defendant the purchase money.—22 A. & E. Ency of Law, (1st Ed.) 948; *Duncan v. Ware*, 5 S. & P. 19, *Elec. L. Co. v. Elder Bros.*, 115 Ala. 153; *Schleicher v. Montgomery L. Co.*, 114 Ala. 228.

WATTS & LETCHER, for appellee. No demurrer was interposed to the complaint, and if it states a substantial cause of action, no inquiry can be now made as to its sufficiency.—Sec. 3333, Code 1896; *Kyle v. Carabello*, 103 Ala. 150; *Marion v. Baganstein*, 98 Ala. 475. The proof authorizes a recovery on the common count.—*King v. Martin*, 67 Ala. 177; *Rushton v. Davis, et al.*, 127 Ala. 288. The contract provided that the title should be satisfactory to Bessie K. Massey, or she should be entitled to the return of the \$500.00.—9 Cyc. 618-621; *Avery v. Lipscomb*, 76 Va. 404; *Church v. Shanklin*, 95 Cal. 626.

MAYFIELD, J.—This was an action by appellee against appellant to recover \$500. The complaint contained the common counts, and six additional special counts were added by amendment, to each of which the defendant pleaded the general issue. The case was tried by the judge of the city court of Montgomery without a jury, and resulted in a judgment for the plaintiff for \$500 and interest thereon. The only error assigned on the appeal is the action of the city court in rendering judgment for the plaintiff below.

Findings and conclusions of courts in cases tried by the judges without a jury, as this was, and when the facts are not agreed upon, and there are no special find-

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ings, nor requests for such findings, the conclusions of the judge stand as the verdict of the jury, and cannot be reviewed by the appellate court, except to determine whether or not the judgment rendered can be supported by the evidence. After a thorough and careful examination of all of the evidence in the case, as shown by the bill of exceptions, we are certain beyond doubt that there was sufficient evidence to support the judgment rendered, and it does not appear that there was any error of which the defendant can complain.

Counsel for appellant base their contention for a reversal upon the ground that the contract of sale of a certain lot in question by the defendant was based exclusively upon a letter written by the agents of the defendant to Messrs. Dowdell & Joseph, which letter embraced a proposition to sell the property, and that Dowdell & Joseph unqualifiedly accepted the proposition contained in the letter, and that the \$500 of plaintiff's money was paid by Dowdell & Joseph to the defendant through her certified check, made payable to them and indorsed by them. It is contended by appellant that this letter of May 7, 1906, to Dowdell & Joseph, contained the only proposition made or offered to be made by the appellant to sell the property; that the proposition was accepted by Dowdell & Joseph, and that the money was paid under it by Dowdell & Joseph to the agents of the defendant in compliance with the terms of the letter of May 7, 1906; and that the plaintiff must therefore have her rights to the \$500 measured by the rights acquired by Dowdell & Joseph under the letter of May 7, 1906. A sufficient answer to this argument is that this is not the contract upon which her claim is based. It is not the contract set forth in her complaint; but, on the other hand, the contract relied upon in the special counts was an option to purchase the land, which option contained

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a stipulation that, "If the title to said property is not satisfactory to the said Bessie K. Massie, then the afore-said five hundred dollars is to be returned to her." There was evidence in support of these special counts 3, 4, 5, 6, 7, and 8. There were no demurrers to any of these counts, testing their sufficiency.

It is not necessary for us to decide whether or not the weight of the evidence tended to prove these counts. It is sufficient, to affirm the judgment of the lower court that there was evidence to support any one of them. According to the undisputed evidence in the case, the defendant had in its possession \$500 of plaintiff's money, and the plaintiff is entitled to recover this money, or she is entitled to a conveyance of the land by the defendant upon a payment of the balance of the purchase price. If the money had been paid under the proposition contained in the letter of defendant's agents to Dowdell & Joseph of May 7, 1906, as is contended by appellant, it is not certain that the plaintiff would not be entitled to recover the money, for the reason that it was a contract for the sale of land, and that it was absolutely void, and that, if the plaintiff paid a part of the purchase price under such void contract, she could recover back the same. This letter, which appellant contends to be the basis of the transaction and to constitute the contract of purchase and sale under which the \$500 was paid, concludes with the following words: "Unless the bid herein referred to is received by May 8, 1906, this proposition is withdrawn. 'Signed W. J. Tuttle, Exalted Ruler.'"

The undisputed evidence shows that the check of the plaintiff for \$500 was not delivered by her attorney, Mr. Watts, to Dowdell & Joseph until the 10th day of May, two days after that proposition was withdrawn under the very terms of the contract or letter itself.

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Consequently, if the money was paid under this contract, it could not have been enforced by Dowdell & Joseph against the defendant, because it was not binding against the defendant, nor even against W. J. Tuttle. But we hold that the great weight, if not all, of the evidence in the case, shows that \$500 was paid by plaintiff to her agent, or by Dowdell & Joseph, under the option described in the complaint, which was signed by W. J. Tuttle and W. J. Osborne. This not only appears from the evidence of all the witnesses who had any knowledge of the facts as to the payment by plaintiff, but it also clearly appears, for the reason that the proposition contained in the letter of May 7, 1906, was not accepted and was withdrawn by the very terms of the letter two days before the check was delivered.

We cannot agree with counsel for appellant in the contention that the undisputed evidence shows that Dowdell & Joseph were acting as exclusive agents for the plaintiff, and not for the defendant. We think the truth of the matter, as it appears from the evidence, is that Dowdell & Joseph were real estate agents attempting to effect a sale between the plaintiff and the defendant, and were attempting to bring the parties together upon a contract, and that they were no more the agents of one party than they were of the other; but this is immaterial and unnecessary to the correct decision of this cause. No matter whose agents they were, or whether they be the agents of any one, it clearly appears that the defendant corporation had received \$500 of the plaintiff's money and that the plaintiff had a right to recover same under any phase of the evidence.

We cannot say, under the evidence in this case, that her dissatisfaction with the title was wholly whimsical or frivolous, and under the option set out in the complaint, if the title was not satisfactory to her, she had a

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right to recover the money; and if it was paid under the other, and not under the option set out in the complaint, the contract under which she paid it was void, so that she could not enforce it against the defendant, and it was, therefore, not binding upon her, and in that event she would be entitled to recover the money paid under such void contract. Therefore, the judgment must be affirmed.

Affirmed.

DOWDELL, C. J., and SIMPSON and ANDERSON, JJ., concur.

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Assumpsit.

(Decided Feb. 4, 1909. 48 South. 662.)

Corporations; Ultra Vires Acts; Guaranty.—The charter power of the corporation to operate a commissary, to buy and sell goods, and to purchase for cash or credit, was ancillary to its main business of lumbering and milling, but did not authorize the corporation to buy goods for another, or to become surety or guaranty for another; hence, the acts of the general manager of the corporation in promising to pay for goods bought by a boarding house keeper was ultra vires the corporation, although it indirectly benefitted the corporation by furnishing board and lodging for its employees.

APPEAL from Geneva Circuit Court.

Heard before Hon. H. A. PEARCE.

Assumpsit by Chapman & Co., against the Gulf Yellow Pine Lumber Co., to recover for goods sold one Lord, a boarding house keeper. From a judgment for plaintiff defendant appeals. Reversed and remanded.

W. O. MULKEY, for appellant. The corporation was without power to make the contract relied on.—*Chewacla*

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L. W. Co. v. Dismukes, 87 Ala. 344; *First Nat. Bank of Gadsden v. Winchester*, 119 Ala. 168; *Steiner & Lobman v. Steiner L. & L. Co.*, 120 Ala. 128; *Lanier L. Co. v. Reese*, 103 Ala. 622; *Machine Co. v. Wilkerson*, 79 Ala. 312; *Sherwood v. Alvis*, 83 Ala. 115; *Marion Bank v. Duncan*, 54 Ala. 471; *Chambers v. Faulkner*, 65 Ala. 448; *R. R. Co. v. Smith*, 76 Ala. 572; *Long v. G. P. Ry. Co.*, 91 Ala. 519. The contract was void under the statute of frauds.—*Webb v. Hawkins L. Co.*, 101 Ala. 633.

W. R. CHAPMAN, for appellee. Counsel discuss the powers of the corporation as organized under the general law.—Sec. 1140, et seq., Code 1896. And conclude that there being no statutory or constitutional prohibition that the enumerated power in the certificate of the defendant company to engage in buying selling goods, wares and merchandise, is authorized by law, and properly conferred. The contract is not that of guaranty or suretyship.—14 A. & E. Ency of Law, 1129 and notes; *White v. Life Assn.*, 63 Ala. 419; 27 A. & E. Ency of Law, 431; *Mobile & C. R. R. Co. v. Nichols*, 98 Ala. 125; *Wimberly v. Wyndham*, 104 Ala. 409. There was no right of recovery against Lord, as there was no obligation.—57 Am. Dec. 197; 5 Am. St. Rep. 114; 95 Am. Dec. 252 and note.

DOWDELL, J.—This suit is against a private corporation organized under the general statute. The complaint is on the common counts. Among other pleas filed are those setting up the statute of frauds and ultra vires. The evidence without conflict showed that the goods, wares, and merchandise, for the price of which the suit was brought, were sold and delivered to one Lord to furnish and maintain a boarding house conducted by

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said Lord, and in which the defendant corporation had no interest, and all of which was known to the plaintiffs at the time of the sale and delivery of the goods.

The defendant corporation under its charter powers was at the time engaged in the lumber and milling business, and in connection therewith carried on, under its charter powers, a commissary; but none of the goods so sold went into said commissary, nor in any way were used by the defendant. The plaintiffs declined and refused to sell to Lord when he applied to purchase the goods, and not until one Flowers, the general manager of the defendant corporation, promised the plaintiffs that the defendant would pay for them, did they sell. The charter provision in reference to the commissary authorized the corporation "to operate and maintain a commissary or storehouse, to engage in the buying and sale of goods, wares, and merchandise, and to purchase for either cash or credit, as it may deem proper." Manifestly this power was intended as ancillary to its main business of lumbering and milling, and in no sense was it contemplated as an authorization to purchase goods for another, or to become surety or guarantor for another. Clearly the act of Flowers, the general manager, in promising to pay for the goods sold and delivered to Lord was an ultra vires contract, and the fact that the plaintiffs would not have delivered the goods to Lord, but for the promise of Flowers that the defendant would pay for the same, and the further fact that the defendant was indirectly benefited, in that the boarding house run by Lord afforded the defendant's employes a place to board, cannot alter the case. The benefits to the corporation in such a case are not such as would raise up an estoppel as to liability.

Our conclusion is that the trial court erred in giving the general charge for the plaintiffs, and in refusing a

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like one to the defendant.—*Greene's Brice's Ultra Vires*, p. 252; *Lime Works v. Dismukes*, 87 Ala. 344, 6 South. 122, 5 L. R. A. 100; *Steiner & Lobman v. Steiner Lumber Co.*, 120 Ala. 126, 26 South. 494.

Reversed and remanded.

SIMPSON, ANDERSON, and DENSON, JJ., concur.

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Action on Insurance Policy.

(Decided April 15, 1900. 49 South. 297.)

1. *Insurance; Cancellation of Policy; Jury Question.*—The question as to whether defendant's agent had complied with instructions from the company to cancel the policy under its terms was one for the jury, under the evidence in this case.

2. *Same; Cancellation of Policy.*—Some affirmative act by the agent being necessary to effect a cancellation, the fact that the agent of the insurance company received a telegram from the company directing him to cancel certain policies, did not of itself operate as a cancellation thereof.

3. *Same; Regulation; Validity.*—Section 4594, Code 1907, is constitutional and valid, and authorizes a recovery in the nature of a penalty of 25 per cent of the loss covered by the policy for a violation of the statute, but not of the loss sustained not covered by the policy.

4. *Evidence; Opinion Evidence; Conclusion.*—Testimony by an employe of the tariff association that he thought the defendant insurance company was a member of the tariff association, but did not think the agency which issued the policy was within the jurisdiction of any stamping office, was not a mere conclusion but tended to show that the defendant was connected with the tariff association, which was within the issues made by the pleading.

APPEAL from Montgomery City Court.

Heard before Hon. A. D. SAYRE.

Action by Nathan Hellner against the Firemen's Fund Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

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The complaint was in Code form as to counts 1, 2, and 3. Counts 4, 5, and 6, were also in Code form, with the additional allegation that the plaintiff claims of the defendant the further and additional sum of \$900, for that the defendant, at the time of the making of the contract of insurance hereinbefore mentioned, or subsequently thereto, belonged to, or was a member of, or in some way connected with, a tariff association or such like, or had an understanding with some person, corporation, or association engaged in the business of insurance, as agent or otherwise, about a particular rate of premium which should be charged or fixed for the kind or class of insurance risk provided for in said policy. The defendant pleaded the general issue, and two separate pleas, as follows: (2) "For further answer, the defendant says that by the terms of the policies, copies of which are hereto attached, and marked Exhibits A, B, and C, the defendant company had the right to cancel said policies at any time by giving five days' notice of such cancellation; and this defendant avers that on, to wit, the 5th day of July, 1906, the defendant company did cancel the policies in accordance with the terms of said policy, by giving to the plaintiff the requisite notice, and that at the time of the alleged loss of the goods the cancellation of said policy had become effective." (3) Same as 2, except that it sets out the condition in the policies as follows: "This policy shall be cancelled at any time at the request of the insured, or by the company by giving five days' notice of such cancellation"—and it is then averred that notice was given and the policies canceled as provided for in the policy, and that at the time of the loss the policies had become non existent.

The policies were in the sum of \$3,000 on a stock of goods, and the other two were in the sum of \$250 each, and covered store fixtures and furniture, and household

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and kitchen furniture. Mr. Young testified that he was stamping clerk for the Southeastern Underwriters' Association, and that he thought the Fireman's Fund Insurance Company was a member of the old Southeastern Underwriters' Association, but did not know whether they belonged to the new association or not; that he thought the Firemen's Fund Insurance Association was a member of the Southeastern Tariff Association on the 18th of June, 1906, but that he did not think Evergreen was under the jurisdiction of any stamping office; that the rates are made by the Southeastern Tariff Association; and that the stamping clerk sees that these rates are complied with, etc. The evidence for the defendant was that about July 4th, 5th, or 6th, notice was given to Hellner by Brooks, an agent of the company, that he had received a telegram, which read, "Cancel numbers ———, ———," which were Hellner's policies; that he read the telegram to Hellner and left it with him; and that it was within a half hour or hour thereafter he served written notice on Hellner of the cancellation of his policies, and requested that he call at his office with the policies duly canceled, and receive return of premium pro rata. The fire occurred on July 29, 1906. The testimony for the plaintiff tended to show that Brooks handed Hellner the telegram, but gave him no further or other notice of the cancellation, but told him to keep the policies until he could write to the company and find out all about it. The telegram was addressed to Brooks, but was left with Hellner after being read by Brooks.

KING, SPALDING & LITTLE, and RAY RUSHTON, for appellant. The court below erred in refusing to grant defendant's motion to exclude the testimony of the witness Young, and in admitting over the objection of the defendant the inventory prepared by the witness Donald.

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The court erred in refusing the general affirmative charge.—110 Ill. App. 471; 113 Fed. 653; 9 R. I. 562. The court should have given written charge 2.—Authorities *supra*, and 59 Tex. 507; 36 Mich. 507; 38 Cal. 541; 33 N. H. 203; Biddle on Insurance, sec. 376; 1 May on Insurance, 122; Joyce on Insurance, sec. 1670. The court erred in its oral charge to the jury.—Authorities *supra*, and 96 S. W. 601. The court erred in instructing the jury that if the plaintiff was entitled to recover at all, he was entitled to recover the penalty.—165 U. S. 150; 21 L. R. A. 189; 12 L. R. A. 70; 134 U. S. 232. Even should the classification under this statute be a proper one, the statute is discriminatory in that it can be applied only to policies of insurance on property.—*Youngblood v. Birmingham R. & S. Co.*, 95 Ala. 521; *Carter Bros. v. Coleman*, 84 Ala. 256; *Mayer v. Stonewall I. Co.*, 53 Ala. 570; 113 U. S. 703; 129 U. S. 29; 118 U. S. 356. The statute is in violation of the rights guaranteed by the Constitution.—*S. & N. R. R. Co. v. Morris*, 65 Ala. 193; *L. & N. R. R. Co. v. Baldwin*, 85 Ala. 627; *Randolph v. B. & T. S. Co.*, 106 Ala. 501; 78 Ill. 55; 165 U. S. 150; 19 S. W. 910. The statute is unreasonable in application.—*L. & N. v. Baldwin*, *supra*. The legislature exceeded its power in directing the construction that the court should place upon the statute.—*Lindsay v. U. S. & L. Assn.*, 120 Ala. 156; Secs. 42 and 43, Const. 1901. The court should have granted a new trial.—*L. & N. R. R. Co. v. Sullivan L. Co.*, 126 Ala. 95.

HAMILTON & CRUMPTON, and STEINER, CRUM & WEIL, for appellee. There was sufficient conflict in the evidence as to what happened between Brooks and the plaintiff to require a submission to the jury as to whether or not there was a cancellation. A provision in an insurance policy reserving to the insurer the right to cancel same

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is strictly construed, and the conditions imposed upon it with respect to giving notice of cancellation must be strictly performed.—*Continental I. Co. v. Parks*, 142 Ala. 650; 13 Fed. 74; 18 Cyc. 648; 2 Joyce on Ins. sec. 1660; 37 L. R. A. 131; 51 N. I. 465; 25 Barb. 189; 51 Ill. 342; 155 N. Y. 163; 152 N. Y. 653. The notice must be distince and unequivocal.—3 Mo. App. 611. The notice was not sufficient.—*Gallaher v. State Mutual*, 150 Ala. 543; *Travellers I. Co. v. Brown*, 138 Ala. 526; 62 Ark. 382; 51 Ill. 342; 55 Barb. 28; 25 Barb. 190; 75 Mo. 310. The statute is constitutional.—*Continental I. Co. v. Parks*, *supra*.

ANDERSON, J.—The appellant had the right, under the terms of the policy, to cancel same upon five days' notice to the insured. Whether or not a return of the premium for the unexpired period, or the notes for same, was a condition precedent to the exercise of this right, we need not decide, as the trial court seems to have ruled favorably to the appellant upon this point. Under either theory of the evidence, the company did no more than notify its agent, Brooks, to cancel said policies. As to whether Brooks complied with the instructions, and actually canceled same, was a question for the jury. The message to Brooks did not operate per se as a cancellation of the policies, but merely instructed him to do so, and until there was affirmative action on his part, canceling same, they remained in force and effect. Of course, had the telegram actually canceled the policies, instead of delegating the duty of so doing to Brooks, and he exhibited the telegram to the insured, it might be questionable whether or not Brooks could have bound the company by any subsequent action looking to a continuation of the policies, inasmuch as the telegram disclosed to the insured the want of authority to do so;

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but the telegram in question was not a peremptory cancellation by the company, to be communicated through Brooks, and was at most a direction to him to cancel, and there was no cancellation unless he actually complied with the direction given him. While there is a conflict in the authorities upon this question, we think the conclusion reached in the case at bar is not only sound and reasonable, but is supported by the majority of the leading and best-considered cases.—*Mohr Distilling Co. v. Ohio Ins. Co.*, (C. C.) 13 Fed. 74; 18 Cyc. p. 648; 2 Joyce on Insurance, § 1660; *Jno. R. Davis Lbr. Co. v. Hartford F. Inc. Co.*, 95 Wis. 226, 70 N. W. 84, 37 L. R. A. 131; *Van Valkenburg v. Lenox F. Ins. Co.*, 51 N. Y. 465; *Goit v. National Protection Ins. Co.*, 25 Barb. (N. Y.) 189; *Actna Ins. Co. v. McGuire*, 51 Ill. 342; *Van Tassel v. Greenwich Ins. Co.*, 151 N. Y. 130, 45 N. E. 365; *Tisdale v. New Hampshire F. Ins. Co.*, 11 Misc. Rep. 20, 52 N. Y. Supp. 166, affirmed 155 N. Y. 163, 49 N. E. 664, 40 L. R. A. 765; *Niche v. Am. Central Ins. Co.*, 152 N. Y. 635.

Section 4594 of the Code of 1907 (section 2619 of the Code of 1896), provides for a recovery of 25 per cent. on the amount of the actual loss or damage, if the insurer belonged to, or was a member of, or in any way connected with, any tariff association, etc., either at the time of the issuance of the policy or subsequently before the trial. This statute was upheld as not being unconstitutional in the case of *Continental Co. v. Parks*, 142 Ala. 650, 39 South. 204, and we need only to cite and reaffirm said decision. The appellant insists, however, on a point not discussed and considered in the Parks Case, *supra*, that the penalty is fixed on the loss or damage sustained, regardless of the amount of the insurance. We think the clear intent and meaning of the statute is to authorize the recovery in the nature of a penalty of 25 per cent.

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on the amount to which the insured is entitled, under the policy—*ex vi termini*, 25 per cent. of the loss or damage as covered in the policy, and not 25 per cent. of the loss or damage sustained and not covered by the policy. Indeed, the trial court properly put this construction on the statute, and instructed the jury that the penalty meant 25 per cent. on the amount which the plaintiff was entitled to recover under the policy. The ruling of the trial court upon the pleading and charges as to the penalty claimed was in harmony with the statute.

The evidence of the witness Young was more than a mere conclusion or opinion, and tended to show that the defendant was connected with the tariff association, and the trial court did not err in declining to exclude same in its entirety.

The judgment of the city court is affirmed.

DOWDELL, C. J., and SIMPSON and MAYFIELD, JJ., concur.

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Breach of Contract.

(Decided Feb. 4, 1909. 48 South. 785.)

1. *Statutes; Repeal; Failure to Incorporate in Code.*—If no contrary intention is expressed in the Acts adopting the Code, the general rule is that general statutes of a public nature in force when the Code is adopted and promulgated, and not embraced therein, are repealed by such omission, and by the laws providing for the preparation, revision, adoption and promulgation of the Code; hence, section 436, Code 1896, was repealed by section 2868, Code 1907.

2. *Limitation of Action; Change of Limitation; Existing Actions.*—Where a judgment is rendered before the adoption of the Code of 1907, the right to take an appeal from which is expressly put at one year by section 436, Code 1896, such appeal from such a judg-

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ment is not affected by section 2868, Code 1907, since it is saved from its operation by section 10 of said later Code.

3. *Contracts; Action for Breach; Allegation of Amount Due and Unpaid.*—In an action for a breach of the contract a complaint alleging that plaintiff had complied with all of the provisions of the contract, but that defendant breached it by not paying the consideration of \$1,000 stipulated in the contract, sufficiently alleges the amount due and unpaid.

4. *Same; Set-off; Burden of Proof.*—Where defendant set off plaintiff's alleged breach of another contract in defense of an action for breach of contract, the defendant has the burden to prove to the jury's reasonable satisfaction, the material allegation of his pleas of set-off, or one of them.

5. *Set-off and Counter Claim; Nature.*—A set-off is a final demand growing out of an independent transaction, not sounding in damages merely subsisting between the parties at the commencement of the suit, and may be either liquidated or unliquidated.

6. *Pleading; Recoupment; Nature of Remedy.*—A plea of recoupment is a proper procedure to bring the matter before the court and have the damages considered where a defendant has been damaged by a breach by plaintiff of the contract sued on.

7. *Charge of Court; Invading Province of Jury.*—The action being for breach of contract with the defense of set-off of plaintiff's breach of that contract, an instruction asserting that it must be shown that the terms of the contract, including the plans and specifications, or some one provision or term thereof, has been broken was not improper as an invasion of the province of the jury.

8. *Appeal and Error; Harmless Error.*—It was not prejudicial, if erroneous to overrule a demurrer to a plea where the evidence without conflict showed that there was no breach of the contract which the pleas set up and alleged to have been breached.

9. *Same; Objections Below; Instructions.*—The duty is upon the party who conceives himself to have been injured by misleading instructions, to request instructions explanatory thereof; and if such party fails to do so in the trial court, he cannot complain of such misleading instructions on appeal.

10. *Same.*—Where part of a charge is harmless to the party appealing, and the other postulate thereof is merely misleading, it does not constitute grounds of reversible error.

APPEAL from Jefferson Circuit Court.

Heard before Hon. A. A. COLEMAN.

Action by the Foy-Hays Construction Company against Theo. Poull, doing business as Theo. Poull & Co. Judgment for plaintiff, and defendant appeals. Affirmed.

The first count in the complaint is for breach of a contract entered into between the parties on the 17th

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day of July, 1905, for the building by the Foy-Hays Construction Company of certain work upon a high school at a fixed price of \$1,000, and an acceptance thereof by the Theo. Poull Company, who had the contract for constructing the entire building, and the breach alleged is the failure to make the payment on the completion of the work. The other counts are for work and labor done and materials furnished, etc. The third plea sets up a failure of plaintiff to comply with the contract of July 17, 1905, in that the plaintiff failed to do such work as per plans and specifications and to the satisfaction of the architect and superintendent in charge of said work, in that the engine room in the basement was never completed, and the floor in the passage was two inches too high, and that said work was not done within the time of the contract, to the damage of the defendant in the sum of \$5,000, which sum is offered to be set off and judgment is claimed for the excess. The second replication to the third plea is that the plaintiff did not put in the cement floor in the basement room designated in the contract for the reason that when he was on the ground and ready to begin filling in same the foundation for machinery in said room was not in and the room was not ready for the floor, and defendant asked plaintiff to leave that alone, and that he would put it in himself, or have it put in.

The following charges were given for the plaintiff: "(3) I charge you that a plea of set-off confesses the debt sued on, but says that plaintiff ought not to have judgment therefor, because he owes the defendant a debt, which the defendant elects and offers to set off against the claim in suit. (4). I charge you that a set-off is a final demand, growing out of an independent transaction, liquidated or unliquidated, not sounding in damages merely, subsisting between the parties at the commence-

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ment of the suit." Charge 5 is set out in the opinion. "(6) I charge you, gentlemen of the jury, that the burden is on the defendant to prove to your reasonable satisfaction the material allegations of his pleas, or one of them, of set-off, including the fact (if it be a fact) that plaintiff breached the contract alleged therein, and that defendant was damaged thereby."

TOMLINSON & McCULLOUGH, for appellant. Under the facts as to the appeal one of the three following propositions is correct: 1. Section 2868, Code 1907, superseded section 436, Code 1896, and the six months within which the appeal could be taken began to run from the time the Code was put into effect, to-wit, May 1, 1908, and the appeal must be sustained.—*Cox v. Davis*, 17 Ala. 714; *Henry v. Thorpe*, 14 Ala. 113; *Doe ex dem. v. Haskins*, 15 Ala. 619; *Ivey v. Bloom*, 53 Ala. 174; *Lewis v. Kindsey*, 33 Ala. 304. This section of the Code cannot be made to act retroactively so as to cut off appellants right of appeal then existing.—*Ivey v. Bloom*, *supra*; *Bradford v. Barclay*, 42 Ala. 375. Any other construction would render section 2868, Code 1907, unconstitutional.—Sec. 95, Const. 1901; 25 994; *Show v. Watterson*, 21 L. Ed. 737. The right of appeal is a matter of right.—Sec. 2837, Code 1907. The court erred in overruling demurrer to the 2nd replication to plea 3.—*Whitehurst v. Boyd*, 8 Ala. 375. Counsel discuss other assignments of error insisted on, but without citation of authority.

FRANCIS M. LOWE and C. B. POWELL, for appellee. The appeal should be dismissed because not taken in time.—43 L. R. A. 287; 68 Am. Dec. 323. The law in force at the time the appeal was granted and not the time the judgment was rendered determines the right to an appeal.—*Mazange v. Slocum*, 23 Ala. 668; *Frankelhei*.

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mer v. Slocum, 24 Ala. 373; 58 S. W. 700; 12 Wis. 412; 58 N. Y. 489; 2 Cyc. 520; 521 and notes. As to set-off see.—*St. L. & T. R. P. Co. v. McPeters*, 124 Ala. 451. The burden of proving all the material allegations of the plea is upon the pleader in recoupment.—*Moore v. Barbour Asphalt Pav. Co.*, 118 Ala. 563. Recoupment must spring out of the very contract or transaction in which the recovery is sought.—*Lawton v. Ricketts*, 104 Ala. 430; *Shepperd v. Dowling*, 103 Ala. 566; *Grisham v. Bodman*, 111 Ala. 194. All reasonable presumptions are indulged in the favor of the trial court.—*Shepperd v. Dowling*, *supra*.

DENSON, J.—This cause is submitted on a motion to dismiss the appeal, as well as on the merits. The motion rests upon the ground that the appeal was not taken within the time prescribed by the statute; that the right of appeal was barred by the statute of limitations. The judgment is a final judgment, and was rendered by the circuit court of Jefferson county on the 19th day of June, 1907. The appeal was taken on the 18th day of June, 1908, more than 6 months after the rendition of the judgment, and 48 days after the Code of 1907 went into effect.

The statute in force at the time the judgment was rendered allowed one year from the rendition of the judgment within which an appeal might be taken (Code 1896, § 436); but section 2868 of the Code of 1907, which became effective on May 1, 1908, provides that "appeals under this chapter, except in such cases as a different time is prescribed, must be taken within six months." It will be observed that there is no saving clause expressed in this section of the Code in respect to judgments in existence at the time the Code took effect. The general rule is that, no contrary intention being expressed in the act

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adopting a code of laws, all general statutes of a public nature in force when the Code is adopted and promulgated, and not embraced therein, are repealed by virtue of such omission, and by the laws providing for the preparation, revision, adoption, and promulgation of the Code,—*Hatchett v. Billingslea*, 65 Ala. 16; *Carmichael v. Hays*, 66 Ala. 543; *Sawyers v. Baker*, 72 Ala. 49; *Werborn v. Austin*, 77 Ala. 381; *Benness' Case*, 124 Ala. 87, 26 South. 942. Under this rule there can be no doubt that section 436 of the Code of 1896 (referred to above) was repealed by the adoption and promulgation of the Code of 1907, leaving in lieu thereof, and as a substitute therefor, section 2868 of the Code of 1907.

But we agree with appellee's counsel that an appeal is a part of the remedy, and is not a vested right.—*Elliott's App. Proc.* § 76; *B. & P. R. R. Co. v. Grant*, 98 U. S. 398, 25 L. Ed. 231; *Dennison v. Alexander*, 103 U. S. 522, 26 L. Ed. 313; *McClain v. Williams*, 10 S. D. 332, 73 N. W. 72, 43 L. R. A. 287, 289; *Smith v. Packard*. 12 Wis 371. This being true, it is our opinion that section 10 of the present Code continues in force the statute of limitations of one year as to all judgments rendered before the adoption of the Code (such as the one here appealed from), and saves to the appellant the appeal which appellee seeks to have dismissed. The case of *Mazange v. Slocum*, 23 Ala. 668, cited by appellee, is not in conflict with the theory that section 10 saves the appeal, as above indicated. In that case a very different proposition was before the court from the one now before us. Section 12 of the Code of 1852 was under consideration. It will be remembered that the Code of 1852 abolished the writ of error as the method of bringing civil cases to this court for review, and for the first time in Alabama established appeal as the remedy. Section 3040 of that Code fixed two years as the limitation

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for the suing out of appeals, and providing that it should not apply to then existing judgments and appeals. The Code took effect on the 17th day of January, 1853. After that date a writ of error (that in the *Mazange-Slocum Case, supra*) was issued on a judgment rendered prior to the specified date. The court held that appeal was the only remedy, and dismissed the writ. So it was the form of the remedy, instead of the question of limitations, that was involved.

But it was sought in that case to save the writ of error under section 12 of the Code, which read as follows: "No action or proceeding commenced before the adoption of this Code shall be affected by its provisions." The court answered that contention—Chilton, C. J., delivering the opinion—as follows: "The meaning of this twelfth section is that actions and proceedings commenced before the Code took effect are governed by the old law as to all continuous proceedings had in the court in which they are pending; but proceedings in the nature of a new action, although predicated upon the determination of the court had under the old law, if commenced after the Code went into operation, must conform to its provisions." It was also held that an appeal, like the writ of error for which it was substituted, was a new proceeding, and was the commencement of proceedings in this court to revise the action of the court below, and therefore could not be regarded as the continuation of proceedings in the lower court. In other words, the effect of the decision was that section 12 did not apply to the remedy by appeal, nor to the writ of error.

Section 10 of the present Code provides that: "This Code shall not affect any existing right, remedy, or defense, nor shall it affect any prosecution now commenced, or which shall be hereafter commenced, for any offense already committed. As to all such cases the laws

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in force at the adoption of this Code shall continue in force." We think it cannot be doubted that to abridge the time within which an appeal may be taken would affect the right of or remedy by appeal. In this case, for instance, if the six-months statute be held to apply to the judgment here appealed from, the appeal was lost when the Code became effective. We are clear in our conclusion that section 10 of the Code continues in force the limitations of one year for appeals from judgments rendered prior to the 1st day of May, 1908. Therefore the motion to dismiss the appeal is overruled.

The action is one for breach of a contract or agreement alleged to have been made between the parties, whereby plaintiff agreed to do certain work for the defendant on the Birmingham high school building; the defendant having contracted with that city to construct such building. It is alleged in the first count of the complaint, which is a special count for breach of the agreement, that plaintiff complied with all the provisions of the contract, but that defendant breached it by not paying the consideration (\$1,000) stipulated in the agreement. It is shown in the count that the consideration was to be paid on the completion of the work. The averments of this count are an answer to the ground of demurrer insisted upon, that the count does not allege the amount claimed as due and unpaid.

Whether the demurrer to the second replication to plea 3 was or was not improperly overruled is immaterial, as the evidence without conflict showed that there was no breach of the contract of July 17, 1905, set up in said plea. The defendant himself testified that there was no material difference between him and the plaintiff "as to the work under that contract." Consequently defendant was entitled to nothing so far as that plea was concerned, even if the replication had not been in the case.

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If a defendant has suffered damages, on account of a breach by the plaintiff of the contract upon which the plaintiff bases his cause of action, a plea of recoupment is the procedure by which defendant may bring the matter before the court and have his damages considered.—*Behrman v. Newton*, 103 Ala. 525, 529, 15 South. 838. For this reason we see no reversible error in the action of the court in giving charge 2, requested by the plaintiff.

The defendant's defense is that plaintiff had breached, to the defendant's damage, a contract made April 1, 1905; and there is testimony in the record which tends to support the defense. The plaintiff requested, and the court gave, the following charge: "(5) I charge you, gentlemen of the jury, that to constitute proof of a breach of contract executed by plaintiff and defendant April 1, 1905, upon the part of the plaintiff, it must be shown that the terms of the contract, including plans and specifications, or some one provision or term thereof, has been broken." This charge is criticised, in brief of appellant's counsel, as being invasive of the province of the jury. The criticism is inapt.

The proposition of law involved in charge 6, given for the plaintiff, is correct; and while the charge is misleading in its tendencies, and the court could well have refused it on this account, yet the defendant could have protected himself against its misleading tendencies, and the court will not be put in error for giving it.—*Woodward Iron Co. v. Curl*, 153 Ala. 215, 44 South. 969.

Charge 4, as copied in the transcript, correctly defines set-off, and was properly given. The charge is not the same as charge 4 set out in appellant's brief, and we have found in the record no charge corresponding with that so quoted by the appellant. But, waiving this point, and taking the brief of counsel as referring to charge 3,

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which he sets out, and which is covered by the sixth ground in the assignment of errors, the court cannot be put in error for giving charge 3, because the evidence of the defendant, Theo. Poull, showed without dispute that there was no material difference between plaintiff and defendant as to the work done under the contract of July 17, 1905, the one sued upon. Therefore plaintiff's demand was proved, and the first postulate of the charge, if erroneous, could not possibly have worked injury to defendant, and the remainder of the charge was misleading merely.

The court did not err in overruling the motion for a new trial.

We have treated all the grounds of error insisted upon in the briefs, but can sustain none, and the judgment appealed from is affirmed.

Affirmed.

TYSON, C. J., and SIMPSON and MAYFIELD, JJ., concur.

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Action for Breach of Lease Contract

(Decided Feb. 5, 1909. 49 South. 76.)

1. *Frauds; Statute of; Leases; Necessity for Writing.*—A lease of land for six years must be in writing, else it is within the statute of frauds. (Sec. 2152, Code 1896.)

2. *Same; Statutory Exceptions; Possession.*—Although the statute required that a lease for a longer term than one year shall be in writing yet where the lessor's agent put the lessee in possession of the land, although only verbally authorized to do so, such possession took the lease without the statute of frauds although it was for a six year term. (McClellan, J., dissents in part.)

APPEAL from Etowah Circuit Court.

Heard before Hon. W. W. HARALSON.

[Elliott v. Bankston.]

Action by W. M. Bankston against J. M. Elliott, Jr., for damages for the breach of a lease contract. There was judgment for plaintiff and defendant appeals. Reversed and remanded.

DORTCH, MARTIN & ALLEN, for appellant. The declarations of an agent as to bygone transactions are not admissible against his principal, nor are bygone transactions themselves admissible when they lie outside of the agency attempted to be shown.—12 Ala. 252; 30 Ala. 553; 61 Ala. 139. The attempted lease was violative of the statute of frauds.—*Norman v. Molett*, 8 Ala. 546; 69 Ala. 358; Brown on Statutes of Frauds, par. 263; 50 Ala. 365; 21 A. & Ency of Law, 676; 15 Peters 141.

GEORGE D. MOTLEY, for appellee. The plaintiff on the undisputed evidence in this case entered into the possession of the land under the contract with Gardner as agent and paid his rent for two years and also put from 160 to 200 loads of manure on the land for rent as provided in said contract. The admission of illegal testimony or the rejection of legal testimony by the court on other matters than the taking of possession or the payment of rents is no cause for reversal.—*Harrison v. Parmer*, 76 Ala. 157. *Baker v. Barclift*, 76 Ala. 414. Where the uncontroverted facts clearly establish the plaintiff's right to recover, erroneous rulings on evidence adverse to the defendant, which would not vary the result, are error without injury.—*Harrison v. Parmer*, supra. When, on the undisputed facts of a case, the plaintiff is entitled to the general affirmative charge, any errors committed by the court in special rulings are not grounds of reversal at the instance of the defendant; since such rulings could not have injured him.—*Bowling v. M. & M. Ry. Co.*, 128 Ala. 550. On the un-

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disputed facts plaintiff is entitled to the affirmative charge in his favor. This being true, the exception reserved by the defendant to the introduction and exclusion of testimony, which did not in the remotest degree tend to produce a conflict in the evidence under which plaintiff was entitled to recover are of no avail.—*Marr v. Miller*, 134 Ala. 347-353; *The B. W. S. Co. v. Mobile*, 125 Ala. 178; *Glass v. Meyer*, 124 Ala. 332.

McCLELLAN, J.—This action, instituted by the appellee against the appellant, sounds in damages for the breach of a contract for rental of real estate for a term of six years; an eviction of the appellee under title paramount being averred in the complaint. The several issues present in the case are raised by pleas of the general issue, of the statute of frauds, of non est factum, and of recoupment. The contract, upon which alone the suit is founded, is in writing, and purports to be an engagement of the tenor stated in the complaint, and to be executed by one Gardner as agent for appellant. Objection to its introduction in evidence, on the ground that the alleged agent was not shown to be, in writing, authorized to execute it, was overruled, and exception taken. This action, and others along the same line, of the court, presents the important question in the case.

Under our statute of frauds (Code 1896, § 2152) leases of real estate, of the duration here involved, must be in writing and conform in structure and execution to the requirements enacted, unless the invocation of the exception provided in subdivision 5 saves the contract from the penalty of the statute. It is expressly required that, if the contract is to escape the ban of the statute, and its subscription is by another than the party to be charged thereby, the agent in the premises must be thereunto lawfully authorized in writing.—*Thompson v. New*

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South Coal Co., 135 Ala. 630, 34 South. 31, 62 L. R. A. 551, 93 Am. St. Rep. 49. Pretermittin, for the present, consideration of the exception mentioned, the primary inquiry is whether the contract, sufficient as it is in other respects, was executed for appellant by one duly authorized? The plaintiff undertook to show the necessary authority by the introduction of two letters passing between the parties. It is obvious that these letters had reference only to the three-year agreement, which the plaintiff himself testified "fell through" before the alleged contract in suit was made. These letters relate to matter of dispute as to what character and what amount of fencing the appellee under the latterly abandoned agreement should construct. They had no reference to a new and different contract. Their whole purpose and effect passed away when the agreement to which they referred was abandoned. So these letters are no evidence of Gardner's authority to bind the appellant to a subsequent six-year lease. The only other testimony introduced to establish the authority of Gardner to validly execute the writing in question was that of the witness Hicks, who testified that he read a paper, held by Gardner, purporting to be signed by appellant, and whose signature it, in his opinion, was, by which Gardner was authorized, as appellant's agent "to rent and lease any land I control, and to receive and receipt for all rents." Notwithstanding defendant's objection that the testimony was secondary, and that the proper predicate for its introduction had not been laid, it was admitted. The objections stated were clearly well taken, and should have been sustained. The numerous declarations of this court, announcing the rule applicable here, are collated in 3 Mayfield's Dig. p. 511 et seq., and 5 Mayfield's Dig. p. 306 et seq., respectively.

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According to the contention of counsel, this brings us to the consideration of the effect of the exception contained in subdivision 5 of the statute of frauds. It reads: "Unless the purchase money, or a portion thereof, be paid, and the purchaser put in possession of the land by the seller."—*On the authority of Jones v. Gainer*, 157 Ala. 218, 47 South. 142, the majority of the court hold that the agent of the seller verbally, but not in writing, so authorized, may put the purchaser in possession and thus invoke the quoted exception.—*Jones v. Gainer*, *supra*, expressly overruled the present case, then already delivered at that term. But the writer acting on the view that, if still within the power of the court (during the same term), the repudiated decision should be recalled, and the law applied to all litigants alike, placed this case on the rehearing docket and recalled the certificate. The court, in due course, rules in this case as it did in *Jones v. Gainer*. I am unable to concur in the conclusion of the majority for the following reasons:

First. The provision in question is an exception or proviso to the statute of frauds, and must be so strictly construed as to confine its effect to those cases only failing fairly within the terms of the exception or proviso.—*U. S. v. Dickson*, 15 Pet. 141, 10 L. Ed. 689; *Bragg v. Clark*, 50 Ala. 363; *Ex parte Lusk*, 82 Ala. 519, 523, 2 South. 140; *Heflin v. Milton*, 69 Ala. 354.

Second. The exception makes no provision for the acts (that must concur), viz., reception of payment of the purchase money, in whole or in part, and the installation of the purchaser in possession, so as to avoid the ban of the statute, to be performed by any other than the seller, him who is to part with his estate.—*Linn v. McLean*, 85 Ala. 253, 40 South. 777.

Third. The exception intended the two acts, viz., reception of payment, in whole or in part, and the placing

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of the purchaser in possession, to be inter parties, between the purchaser and the owner. To interject a merely verbally authorized agent is to affirmatively invite the very mischief intended to be cured by the statute. Brickell, C. J., in *Heflin v. Milton*, wrote: "There can be no relaxation of the requisitions of the statute, without introducing the mischief intended to be avoided."

Fourth. If an owner may delegate the authority to sell or lease, for a longer term than one year, his land by the reception of payment and the installation of the purchaser, then certainly the spirit and purpose of the statute of frauds is ignored, if such authority may exist only in parol. Since before the statute an agent merely verbally authorized could bind the owner to a sale or leasing of his land, it is inconceivable that the enactment should have left unrestricted the authorization of an agent to do an act which the statute provides shall avoid the condemnation thereof, just as it is inconceivable that the farmer would restore his leveled fence around his growing crop and at the same time leave permanently open a broad gate thereto. The object of the statute was to forestall, for reasons too familiar to need restatement, parol agreements touching the subjects enumerated; and the only exception is that written in the subdivision 5. If it had been the legislative purpose to leave unrestricted the field of agency under the exception, it is manifest that the expression "by the seller" would not have been written, or the addition of the expression "or by his agent" would have been made.

Fifth. In *Heflin v. Milton*, it is said: "It is as offensive to its letter, spirit, and policy that a purchase of lands by a fraud or perjury, of by the uncertainties of parol evidence, be forced upon the one party, as that the owner of lands should be deprived of his estate by fraud or perjury, or evidence resting in parol." If the seller may

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be deprived of his estate by the act of an agent merely verbally authorized, surely the mutuality of the provisions of the exception would apply to the purchaser as well; and, if so, a merely verbally authorized agent of the ostensible purchaser could make the payment, which may be only in part, and be placed in possession by the seller's merely verbally authorized agent, and the exception would be met. Sale and purchase of lands would be complete, and the whole transaction would rest in parol. If the statute and its exception permits, much less contemplates, such a result, then has it not failed in a most material feature of its object?

To proceed: The effect of the ruling of the majority is to justify the court in refusing special charges 1, 2, and 3, requested by the defendant. This question was propounded to the plaintiff: "Whether or not he had ever rented other lands from Gardner as the agent of Elliott and paid rent to him? The interrogatory was not within the principle announced in *Hill v. Helton*, 80 Ala. 538, 1 South 340. Besides, as a general rule, acts or declarations of a reputed agent are not admissible to show the fact of his agency.—*George v. Ross*, 128 Ala. 666, 29 South. 651; *McDongald v. Dawson*, 30 Ala. 553. To the plaintiff, in rebuttal, was propounded this question: "What would you have made on the place in the remaining years of the lease, if the manure provided for by the contract had been put on the land?" The objection to the question should have been sustained.—*Snodgrass v. Reynolds*, 79 Ala. 452, 58 Am. Rep. 601. Had the inquiry involved a crop already growing, as was the status in the cited case, it is possible the question might have been permissible. But, as is said in that case, "it is different where the land is leased for general and undefined agricultural purposes." The question, as put, obviously invited a speculation.

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This disposes of all the questions argued. We have not considered, because not raised, the possible inquiry, on the present state of the pleadings, whether the plaintiff can recover unless it is shown that the instrument sued on was executed by an agent duly authorized to do so, and if not, whether the exception to the statute of frauds can avail. We intimate no opinion in the premises.

For the errors indicated, the judgment is reversed, and the cause is remanded.

Reversed and remanded. All the Justices concur.

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Assumpsit.

(Decided April 7, 1909. 49 South. 225.)

1. *Action; Commencement; Filing; Complaint.*—The filing of a complaint with the clerk of the circuit court is the commencement of an action. (Section 4853, Code 1907.)

2. *Dismissal or Non Suit; Grounds; Discontinuance.*—The summons and complaint was filed with the circuit clerk on April 3, 1907, but was not executed before the spring term of the court, and was returned to the court without any return of service after the expiration of the time of service, and the cause was not docketed at such term. On August 31, following under the plaintiff's direction, the clerk erased the date in the summons and complaint originally filed and inserted the date of August 31, 1907, refiled the papers, signed the summons and delivered them to the sheriff who executed and returned the same on September 5, and the case was placed upon the docket. Held, that under this state of facts it was error to dismiss the action brought on August 31, on the grounds that there had been a discontinuance, for if there was a discontinuance of the first action, the plaintiff could bring the second; and if there had not been a discontinuance, the pendency of the first action would be a matter of plea in abatement to the second action and not a plea in bar.

3. *Same; Voluntary Dismissal; Acts Constituting.*—Where a summons and complaint was filed in April but not served in time for the next term of court, and was returned without endorsement of service, and the date of filing was erased by direction of the plaintiff and

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a subsequent date inserted and the case docketed, if not a dismissal of the first action, was tantamount to a dismissal in vacation, though not intended as such, it not being necessary to notify the defendant of such dismissal as there had been no service in the first instance. (Section 5357, Code 1907.)

4. *Same; Discontinuance; Nature and Effect.*—A discontinuance is in effect an abandonment of the same cause and a declaration of plaintiff's willingness to stop the action, but it is not an adjudication of his cause by the proper tribunal nor an acknowledgment by him that his claim is not well founded.

APPEAL from Wilcox Circuit Court.

Heard before Hon. THOM. L. COCHRAN, Special Judge.

Assumpsit by the Farmers O. & M. Co. v. Melton & Stuart. From a judgment of dismissal plaintiff appeals. Reversed and remanded.

N. D. GODBOLD, for appellant. No discontinuance happened.—*Ex parte Humes*, 130 Ala. 203; *Garrett v. Mayfield W. Mills*, 44 South. 1026; *Ex parte State*, 71 Ala. 367.

J. N. MILLER and J. M. BONNER, for appellee. The suit was discontinued.—*Ex parte Hall*, 47 Ala. 680; *Ex parte N. E. A. R. R. Co.*, 37 Ala. 679; Sec. 3283, Code 1896; *Armstrong v. Robinson*, 2 Ala. 164; *State v. Drinkhart*, 20 Ala. 9; *Barclay v. Barclay*, 42 Ala. 347. There was no waiver by the entrance of the defendant as the entrance was special.—*Tampley v. Beavers*, 25 Ala. 534; *Griggs v. Gilmer*, 54 Ala. 425; 19 Wall. 570; 16 Wall. 203; *Stetson v. Goldsmith*, 30 Ala. 602; *Scott v. Hull*, 14 Ind. 136.

MAYFIELD, J.—There is but one question involved in this appeal—whether there was a discontinuance of the cause of action. The facts seem to be undisputed, and are as follows: The plaintiff lodged with the clerk of the circuit court of Wilcox county the summons and complaint on the 3d day of April, 1907, and the clerk

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on the same day signed the summons and placed the summons and complaint, or copies thereof, in the hands of the sheriff of that county. The summons was not executed before the spring term of the circuit court, but was handed back to the clerk by the sheriff, without a return thereon, after the expiration of the time for service. The cause was never docketed at the spring term, 1907, and therefore no order was asked or taken at the spring term of the court. On the 31st day of August, 1907, the clerk, acting under direction of plaintiff's attorney, took the summons and complaint originally filed with him, erased the date "April 3, 1907," and inserted in lieu thereof the date "August 31, 1907," and refiled the paper and signed the summons on the 31st day of August, 1907, and placed the same, or copies thereof in the sheriff's hands for service on defendant on the same day; and the sheriff executed the writ on the 5th day of September, 1907, and returned the same to the circuit court as of that date. The summons and complaint as last issued were placed upon the docket. The defendant had entered no appearance upon the appearance docket by himself or counsel, but had had witnesses subpoenaed at the fall term, and after having the witnesses subpoenaed, on the 29th day of October, 1907, he entered a special appearance for the purpose only of moving to dismiss the cause for the reason that there had been a discontinuance by failure to have the cause continued at the spring term, or to have an alias summons and complaint issued at the fall term, returnable at the next term. The cause was heard upon this motion to dismiss because of a discontinuance, and upon the facts above set forth, which were undisputed, the court granted the motion, and entered an order on the minutes of the court dismissing the cause and taxing the plaintiff with the costs. From this judgment the plaintiff appeals, and

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assigns as error the judgment and order of the court dismissing the action and taxing the plaintiff with the costs.

The trial court was clearly in error in dismissing this cause of action. It is unnecessary to decide whether or not there had been a discontinuance of the cause of action brought on the 3d day of April, 1907, for the reason that it would be error for the court to strike the cause of action brought on the 31st day of August, 1907, on the ground of discontinuance, whether there had been a discontinuance before or not. If there had been a discontinuance of the first action brought, plaintiff had a right to bring the second on the 31st day of August, 1907. If there had not been a discontinuance, there were two causes of action pending at the same time, in the same court, between the same parties, as to the same subject-matter, and the second suit might then have been abated by a plea in abatement because there was another pending; but in that event the first would still be pending, and the defendant, for the first time, could have had an alias summons issued upon the original complaint. There is no doubt that the filing of the complaint with the clerk on the 3d day of April, 1907, and the delivery of the same by him to the sheriff, was the commencement of the suit within the meaning of our statute.—Code 1907, § 4853; *West v. Engel*, 101 Ala. 509, 14 South. 333.

Whether or not the failure of the plaintiff to have the cause entered upon the docket and to obtain a continuance, or to have an alias summons and complaint issued because of failure to serve before that term, amounts to a discontinuance, it is not necessary to decide, for the reason that the refiling of the action on the 31st of August, 1907, was as much the beginning of another suit as the filing of that of April 3d was the commencement of the original; and certainly it cannot be contended that

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there was a discontinuance of that cause for the reason that the motion was made and the action dismissed at the first term of the court at which there could have been any action by the plaintiff or the court. The conduct of the plaintiff on the 31st day of August, 1907, if not a discontinuance of the first action brought, was a dismissal in vacation, under section 5357 of the Code. There having been no service, no notice was required; and, while the plaintiff may not have intended his action as a dismissal, it was tantamount to a dismissal of the first cause of action and the bringing of the second. This did not and could not result in injury to the defendant, other than possibly to render him liable for some additional cost. A discontinuance or dismissal of a former action cannot be pleaded as a retraxit in bar of a new suit, and such dismissal or discontinuance cannot operate as a retraxit or bar a second cause of action. So, if there was any discontinuance, it was of the first cause of action brought, and not of the second; and, as stated above, if there was no discontinuance or dismissal of the first action when the second was brought, it would be matter for plea in abatement, and not in bar.

It is possible that the plaintiff was negligent in not having his first cause of action placed upon the trial docket, and in not having an alias summons and complaint to issue, which the court only could do; but, if guilty of such negligence, it was without possible injury to the defendant, for the reason that there had been no service or notice whatever to the defendant, and under the statute he had a right to dismiss this action in vacation and without notice, and, this being done, he had a right to bring the second action at the time and in the manner recited. While it might have been improper for the plaintiff and the clerk to use the court papers theretofore filed in the original suit, yet this could not

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amount to a discontinuance of the second cause. There can be no question that there was anything approaching a discontinuance of this second action, because the motion was made by the defendant to dismiss it at the first term of the court at which any action could have been taken by the plaintiff.

A discontinuance is in substance and effect an abandonment by the moving party of his pending cause. It is a mere gap or chasm in the proceedings, occurring while the suit is pending. It is nothing more than an action or declaration of the plaintiff's willingness to stop the pending action. It is not an adjudication of his cause by the proper tribunal, nor is it an acknowledgment by himself that his claim is not well founded, nor can it amount to a bar of another action.—*Ex parte Humes*, 130 Ala. 201, 30 South. 732; *Hayes v. Dunn*, 136 Ala. 528, 34 South. 944; *Bullock v. Perry*, 2 Stew. & p. 319.

The judgment is reversed, and the cause remanded.

DOWDELL, C. J., and SIMPSON and DENSON, JJ., concur.

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Breach of Contract.

(Decided Feb. 4, 1909. Rehearing denied April 6, 1909.
49 South. 75.)

1. *Contracts; Construction.*—A contract should be construed if possible so as to support rather than defeat it; the whole instrument should be construed together in determining its meaning and so as to effectuate each part if possible; but should be construed most strongly against the person undertaking or entering into the obligation.

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2. *Same; Termination; Mutual Consent.*—Independent of any provision in the contract permitting them to do so, parties to a contract may terminate it by mutual consent.

5. *Same; Construction; Right to Terminate.*—Where the contract provided that the plaintiff should remove his saw mill to a certain tract of land and manufacture logs into lumber as per bills furnished by the defendant from time to time, the defendant to furnish such logs as he desired to have sawed and further proving that the timber to be sawed under the contract should include all the timber bought by defendant on said tract and that the contract should continue so long as plaintiff complied therewith and until the timber on that tract was exhausted, unless otherwise terminated before that time, the defendant could terminate the contract by refusing or failing to furnish logs to be sawed. (Tyson, C. J., dissents.)

APPEAL from Morgan Law and Equity Court.

Heard before Hon. THOMAS W. WERT.

Action by B. F. Ashby and others against John Cathcart. From a judgment for defendant on nonsuit, plaintiffs appeal. Affirmed.

The contract sought to be enforced is as follows: "This contract and agreement, made and entered into this 1st day of June, 1905, by and between John Cathcart, of New Decatur, Alabama, party of the first part, and Ashby & Landtroop of Athens, Alabama, parties of the second part, witnesseth: That the party of the first part has this day contracted with the parties of the second part, whereby the said parties of the second part are to move their sawmill at once upon a tract of land near Harris Station, Alabama, known as the Richardson tract, and saw timber, lumber, and scantling for the said party of the first part, upon the following conditions and for the following prices, to wit: (1) Parties of the second part are to move at once and set up their sawmill on the lands above mentioned, at some spot to be selected by both parties, and are to manufacture into lumber, timber, or scantling oak and pine timber as per bills to be furnished them from time to time by the party of the first part; all timber, lumber, or scantling to be manufactured in a good workmanlike manner, and when so man-

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ufactured to be placed outside of the mill in a place easy of access to teams and wagons for the purpose of loading and hauling away same from said mill. (2) The parties of the second part agree that the said mill which they shall set up on the land herein set out shall be of sufficient capacity to cut five thousand feet or more lumber per day. (3) The party of the first part is to furnish such logs as he may desire to have sawed to said mill and put same on mill skid or mill yard. (4) It is understood and agreed that, if at any time the party of the first part may find it necessary, he may from time to time request the parties of the second part to cease sawing under this contract, which request will be respected by the parties of the second part; and it is further understood and agreed that the timber to be so sawn on the contract herein shall include all the timber bought by the party of the first part from Richardson, the owner of said tract of land, with the exception of the 1 and 2 oak logs, and the said contract shall continue as long as the second parties fully comply with same, and until the timber on said Richardson tract shall become exhausted. Then this contract shall be at an end, unless otherwise terminated before that time. (5) It is further understood that, if the said parties of the second part shall fail in the performance of this contract, then the said Cathcart may pay him any amounts due hereunder and he will vacate the premises of the said Cathcart without delay. (6) For all lumber, timber, or scantling manufactured by the parties of the second part, as per specifications and terms of this contract, the said party of the first part is to pay the second parties the sum of three (\$3.00) dollars per thousand feet log scale, said scale and measurement to be made by the party of the first part, and said payments to be made on the first and fifteenth of each month after the sawing is commenced as

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herein for all logs sawed up to that date. (7) It is also understood and agreed that any buildings which the said second parties may erect in the prosecution of the work herein are to remain on the land when his said mill is removed and that he will have no further interest in same. Witness our hands and seals the day and date first above written. John Cathcart. (L. S.) Ashby & Landtroop, (L. S.) by B. F. Ashby. Signed in duplicate. Witness: L. P. Martin."

The breach of this contract was made the basis for damages, and the breaches alleged were variously stated as for a failure to furnish logs; the furnishing of logs to other sawmills which ought to have been furnished defendant, and various other acts of defendant, making it impossible for plaintiff to comply with the contract. The demurrers material to the points decided take the position that the contract is terminable at the election of the defendant, and that by his acts he elected to so terminate the contract.

W. R. WALKER, for appellant. Where party disabled himself to perform his part of the contract neither demand for performance nor tender of performance by the other party thereto is required before he can institute suit for a breach thereof.—*Ware L. Co. v. Sullivan Logging Co.*, 120 Ala. 558; *McTigh v. McLean*, 93 Ala. 626; *Danforth v. T. C. R. R. Co.*, 93 Ala. 614; *Peck-Hanna & Co. v. Heifner*, 136 Ala. 472; *Fletcher v. Prestwood*, 43 South. 231; *Henderson-Boyd L. Co. v. Cook*, 42 South. 838; *Milligan v. Keyser*, 42 South. 367; *Murray v. Barnhardt*, 42 South. 489; *Christy, et al. v. Patton*, 42 South. 614. A refusal of one party to a contract to perform his part thereof is a waiver of the conditions precedent otherwise required of the other party.—*Elliott v. Howison*, 146 Ala. 568; *Heironymus Bros. v. Bienvills sup. Co.*,

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131 Ala. 447; s. c. 138 Ala. 577; *Drake v. Gorse*, 22 Ala. 409; *Fayles v. McCree*, 36 Ala. 64; *Mason v. Ala. I. Co.*, 110 Ala. 567. Where there are conditions precedent to be performed, the party failing to fulfill them is liable for a breach of the contract.—*Nesbitt v. McGehee*, 26 Ala. 748; *Powell v. Sammons*, 31 Ala. 552. The refusal to designate where designation goes to the gist of the contract is a breach for which action will lie.—*Florence Wagon Works v. Kalamazoo, etc. Co.*, 145 Ala. 528. Where one party by his acts prevents the performance of a contract by the other party there is a breach.—36 N. Y. 388; 21 Vt. 469; 1 A. & E. Ency of Law, 921; 25 L. R. A. 719; 149 U. S. 1; 181 U. S. 452. Where one party prevents the performance of the contract by the other party profits which would have accrued by the performance of the said contract is the measure of damages for the breach.—*Peck-Hammond v. Heifner, supra*; *Danforth v. T. C. R. R. Co. supra*; s. c. 99 Ala. 331; s. c. 112 Ala. 80; *Robinson v. Bullock*, 66 Ala. 548; *Fayles v. McCree, supra*. The law leans against the destruction of contracts because of uncertainty and they are not suffered to perish unless the intention of the parties thereto cannot be fairly and reasonably collected and effectuated.—*Boykin v. The Bank*, 72 Ala. 262; *Robinson v. Bullock, supra*; s. c. 58 Ala. 618; *Pollard v. Muddox*, 28 Ala. 325; *White v. Word*, 22 Ala. 442; *Holst v. Harmon*, 122 Ala. 460; *Byrne Mill Co. v. Roberts*, 42 South. 1008; *Abney v. Moore*, 105 Ala. 131. Under this contract and the evidence its construction should have been submitted to the jury.—*Boykin v. The Bank, supra*; *W. U. T. Co. v. Way*, 83 Ala. 560; *Weir v. Long*, 145 Ala. 328; *Mobile D. D. Co. v. McMillan*, 31 Ala. 711. It is always permissible to show by parol evidence the surrounding circumstances of the party to the contract in order that

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their intentions may be ascertained.—*Davis v. Roberts*, 89 Ala. 402; *Crass v. Scruggs & Co.*, 115 Ala. 258; *Mason v. Ala. I. Co.*, 73 Ala. 270; *Robinson v. Bullock*, *supra*; *Weir v. Long*, *supra*; *Pollard v. Maddox*, *supra*. A promise is a good consideration for a promise, and under the facts in this case the mutuality of obligation became established.—*Barley v. T. & M. Co.*, 128 Ala. 183; *Sheffield F. Co. v. Hull C. & C. Co.*, 101 Ala. 446; *Fayles v. McCree*, *supra*; *Mason v. Ala. I. Co.* *supra*. Profits which might have been made and which may be ascertained as reasonable serves as the measure of damages in this case.—*Young v. Cureton*, 87 Ala. 727; *Bell v. Reynolds*, 78 Ala. 511; *Penn v. Smith*, 104 Ala. 445; *Culver v. Hill*, 68 Ala. 66; *Vandegrift v. Abbott*, 75 Ala. 487; *Houghton v. Miller*, 84 Ala. 538; *Murphy v. Farley*, 124 Ala. 279 and authorities *supra*. Expenses are recoverable when profits cannot be proven.—*Wothington v. Gwin*, 119 Ala. 44; *Danforth v. T. & C. R. R. Co.* *supra*; *U. S. v. Meehan*, 110 U. S. 383; *Weir L. Co. v. Sullivan L. Co.* *supra*.

E. W. GODBEY, for appellee. This contract is unilateral and under its terms might be terminated by Cathcart at any time. The judicial definition of the word, "desire" may be found in the following cases.—*Am. Cot. Oil Co. v. Kirk*, 68 Fed. 791; *Harrison, et al. v. Wilson L. Co.*, 45 S. E. 730; 101 Ga. 810; 117 Fed. 474; *Campbell v. Lambert*, 51 Am. Rep. 1. The absolute power over operations was vested in Cathcart not only by a passive but by a positive veto.—52 Atl. Rep. 751; 143 Fed. 750; 78 S. W. 104; 60 Am. St. Rep. 86; 175 Pa. 213. The contract was uncertain which destroyed all its mutuality.—24 L. R. A. 357; 31 Mich. 43; 33 Mich. 331; 55 Am. Rep. 708. The contract is void because of uncertainty and the speculative character of damages.—

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Erwin v. Erwin, 25 Ala. 236; *Howard v. R. R. Co.*, 91 Ala. 268; *Pulliam v. Schimpf*, 19 South. 430; *Allis v. McLean*, 12 N. W. 640; *Moulthrop v. Hyatt*, 105 Ala. 493; *Nichols v. Rash*, 35 South. 411; 1 L. R. A. 843; 3 L. R. A. (N. S.) 709; *Southern Ry. Co. v. Coleman*, 44 South. 837; *Watson v. Kirby*, 112 Ala. 436; 42 Am. Rep 460; 69 Pa. St. 432. Indefiniteness as to time avoids the contract.—*Christy, et al. v. Patton*, 42 South. 614; 18 N. W. 394; *Southern Ry. Co. v. Coleman, supra*. Uncertainty as to dimensions is fatally indefinite.—*Smith v. Aiken*, 75 Ala. 209; 5 Words & Phrases, 4257. Requisite certainty cannot be supplied by subsequent events.—*Byrne M. Co. v. Robertson*, 42 South. 1008; 1 Sutherland on Damages, sec. 13; 24 L. R. A. 359. Expenses are not recoverable.—133 Ala. 441; *Blacksheer v. Hood*, 45 South. 958; *Beck v. West*, 87 Ala. 218; 91 U. S. 324; 57 L. R. A. 696; 40 Mich. 322; *Moore v. Westinghouse E. & M. Co.*, 112 Ala. 542. It was not shown that the mill was kept idle.—19 L. Ed. 484; 105 U. S. 224; 20 C. C. A. 515.

ANDERSON, J.—We fully recognize the rule that in the construction of contracts the whole instrument should be considered in determining the meaning of any or all of its parts. The contract should be supported, if possible, rather than defeated. All parts should be construed, if possible, so as to give validity and effect to each, and all instruments should be construed *contra proferentem*; that is, against him who gives, or undertakes, or enters into an obligation.—*Comer v. Bankhead*, 70 Ala. 136; 2 Parsons on Contracts, 13 16; *Chicago v. Sheldon*, 9 Wall, 50, 19 L. Ed. 594. But we think the contract under consideration, after applying the foregoing rule against the appellee to its construction clearly and unreservedly gave the appellee the right to terminate

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same by failing to furnish logs, as he agreed to furnish only such logs as he desired to have sawed. If he did not desire to do so, he did not, under the contract, have to do so. It is true the timber to be sawed embraced all on the "Richardson" tract, except the 1 and 2 oak logs, "and the said contract shall continue as long as the second party fully complies with same, and until the timber on the Richardson tract shall become exhausted. Then this contract shall be at an end, unless otherwise terminated before that time." We are therefore in a measure relieved from an interpretation of the third clause of the contract, as the parties themselves evidently meant and understood that it gave the appellee the option of not furnishing the logs, unless he desired to do so, by expressly recognizing in clause 4 that it could be terminated by Cathcart before all the timber on the Richardson land was exhausted; for, in fixing the period of its termination, it guardedly says, "unless otherwise terminated before that time," thus emphasizing that a right to terminate existed before all the timber was cut and sawed. It evidently had no reference to a termination by mutual consent, as the parties had this right, independent of any clause or proviso in the contract.

The trial court did not err in sustaining the defendant's demurrers to the complaint, and the judgment of the city court is affirmed.

Affirmed.

DOWDELL, SIMPSON, DENSON, and MAYFIELD, JJ., concur. TYSON, C. J., dissents.

[Brady v. Green.]

Brady v. Green.*Action for Breach of Contract.*

(Decided Feb. 18, 1909. 48 South, 807.)

1. *Vendor and Purchaser; Contract; Concurrent Condition.*—A contract whereby the purchaser agrees to purchase and the vendor agrees to sell the real estate therein described for a specific consideration, contemplates that the payment of the price and the execution of the conveyance should be contemporaneous, and creates concurrent dependent conditions on each to do that which each had engaged to do.

2. *Same; Breach of Contract; Complaint.*—Under a contract whereby the purchaser agrees to buy and the vendor to sell certain described property at a given price, the complaint for a breach thereof which alleges that the purchaser was ready, able and willing and offered to comply with his part of the contract, and that the vendor refused to convey the property, sufficiently avers performance by the purchaser of the acts necessary to put the vendor in default.

3. *Same; Contract; Performance.*—Where the vendor refuses to convey it is not incumbent on the purchaser to tender to the vendor a deed to the property prepared for conveyance, in order to maintain an action for the breach of the contract.

4. *Same; Price.*—A contract for the sale of real estate for a stated consideration imports the payment of cash in the absence of stipulations for credit.

APPEAL from Mobile Circuit Court.

Heard before Hon. SAMUEL B. BROWNE.

Action by Ignatius Green against P. F. Brady for breach of contract. From a judgment for plaintiff, defendant appeals. Affirmed.

The complaint as amended is as follows:

“(4) The plaintiff claims of the defendant \$500 damages for the breach of an agreement entered into by him on the 24th day of February, 1905, in substance as follows: The plaintiff agreed to buy and the defendant agreed to sell, for the consideration of \$4,000 net, property in Tuscaloosa, Ala., on Madison street, known as the old jail and the opera house, and the contents of

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the latter; and plaintiff says that, although he was ready, able, and willing, and offered, to comply with his part of the contract, the defendant failed to comply with the following provisions thereof, viz.: The defendant refused to convey the property above described to plaintiff, to the damage of plaintiff in the amount aforesaid, with interest.

“(5) Same as 4, except it is alleged that said property was owned by Louise Brady, wife of the defendant.

“(6) Plaintiff claims of the defendant \$500 as damages for the breach of an agreement entered into by him on the 24th day of February, 1905, by which defendant promised to sell plaintiff and plaintiff was to buy, for the sum of \$4,000 net, property in Tuscaloosa (the same property as described in count 4), which said agreement the defendant refused to carry out, although plaintiff was ready, able, willing, and offered, to comply with his part of the agreement, to the damage of plaintiff,” etc.

The grounds of demurrers are sufficiently stated in the opinion of the court.

FITTS, LEIGH & LEIGH, for appellant. The counts are on a dependant covenant or agreement and the appellee should have averred either in express terms that he complied with his part of the agreement or set out facts constituting a sufficient excuse for the failure to comply.—9 Cyc. 721-724; *Harvey v. Trenchard*, 6 N. J. L. 126; *Johnson v. Collins*, 17 Ala. 318; *Pate v. McConnell*, 106 Ala. 449; *LeBron v. Morris*, 110 Ala. 115; *Harper v. Johnson*, 129 Ala. 296; *Chapman v. Lee*, 55 Ala. 16. The counts should have averred when, where, how or upon what terms or in what time the purchase money should have been paid.—1 Chitty's Pleading 277; *Manier & Co. v. Athens*, 112 Ala. 663.

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INGE & ARMBRECHT, for appellee. The assignments of demurrer are general and should not be considered.—Section 3303, Code 1896. The court properly overruled the demurrers, even if not general.—*Robbins v. Harrison*, 31 Ala. 160; *Broughton v. Mitchell*, 64 Ala. 222; 24 A. & E. Ency of Law, 1095; 29 Ib. 691; 22 Ency P. & P. 756-7; *Wade v. Killo*, 5 S. & P. 450; *Garnett v. Yhoc*, 17 Ala. 77; *Bedell v. Smith*, 37 Ala. 625; *Hawkins v. Merritt*, 109 Ala. 265; *Ashurst v. Peck*, 101 Ala. 509; *Carlisle v. Carlisle*, 77 Ala. 343.

McCLELLAN, J.—The three counts of the complaint as last amended, assailed by the demurrers, contain these presently important averments: “The plaintiff agreed to buy and the defendant agreed to sell, for the consideration of \$4,000 net, property in Tuscaloosa, Ala., on Madison street, known as the old jail and the opera house, and contents of the latter; and the plaintiff says that, although he was ready, able, willing, and offered to comply with his part of the contract, the defendant failed to comply with the following provisions thereof, viz.: The defendant refused to convey the property above described to the plaintiff. * * *” The demurrers, in their first phase, take the point that the averments quoted fall short of the necessary acts in order to put the defendant in default and hence render him liable for breach of the contract, in that it is not averred that plaintiff tendered the money and a conveyance of the property to the defendant, or that no excuse for a failure to so tender the conveyance and the money is set forth in the counts. It is too clear for doubt that the intention of the parties, as expressed in the contract pleaded, contemplated that the payment of the money and the conveyance of the property should be contemporaneous, thus creating concurrent, dependent conditions upon each to do what each had engaged to do.—99 Cyc. pp. 719, 720, and notes;

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Jones v. Somerville, 1 Port. 437; *Broughton v. Mitchell*, 64 Ala. 210; *Jones v. Powell*, 15 Ala. 824; *Ledyard v. Manning*, 1 Ala. 153; *Davis v. Adams*, 18 Ala. 264; *Bank of Columbia v. Hagner*, 1 Pet. 461, 7 L. Ed. 219; *McKleroy v. Tulane*, 34 Ala. 78; *McGehee v. Hill*, 4 Port. 170, 29 Am. Dec. 277; 4 Ency. Pl. & Pr. p. 639, and note.

With reference only to the question of necessity vel non to actually tender the price agreed upon, a controlling consideration in determining to what extent the pleader must go in allegation of his acts under the contract in order to fix, and thus declare in his complaint, liability of the opposite party for the breach of the contract, has been thus stated in *McGehee v. Hill*, *supra*; "The seller ought not to be compelled to part with his property without receiving the consideration, nor the purchaser to part with his money without an equivalent in return." From the quoted premise it is further said that one cannot proceed against his adversary in the contract "without an actual performance of the agreement on his part, or a *readiness and ability*" to do so; "and an averment to that effect is always made in the declaration containing defendant's undertakings, and that averment must be supported by proof." (Italics supplied.) In *Ledyard v. Manning*, 1 Ala. 156, the same rule has been declared in this form: "When two acts are to be done at the same time on a day named, or *generally*, by the opposite parties, neither can maintain an action without showing performance, or an *offer to perform*, or, at least, a readiness to *perform*, though it was uncertain which of them was bound to do the first act." (Italics supplied.) Our decision in *McGehee v. Hill*, *supra*, in the respect quoted above, found authority in *Bank of Columbia v. Hagner*, 1 Pet. 461, 7 L. Ed. 219, and the influence of that opinion in the establishment of the phase of the law under consideration may be seen by reference to 2 Rose's Notes, p. 745 et seq.; and the doc-

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trine announced and approved in *McGehee v. Hill* is thoroughly supported by the text-writers before cited, and such approval is based on the weight of authority.—*Elliott v. Howison*, 146 Ala. 568, 40 South. 1018.

If actual tender of the money, rather than tender of performance, coupled with ability to perform, was required of the purchaser, whose actual performance was not contemplated by the parties to be more than a concurrent condition with that of his adversary to convey, he would be necessarily placed in the attitude of surrendering his money without the equivalent in return of the property he had engaged to buy. The readiness, willingness, ability, and offer of plaintiff to perform, and, on the other hand, the refusal thereupon of defendant to perform on his part, is averred. This phase of the demurrer was, therefore, properly overruled.

The phase of the demurrer objecting that it is not averred that the plaintiff prepared and tendered to the defendant a proper conveyance of the property affected by the contract cannot be sustained, since a refusal of the defendant to convey is expressly alleged. The decision of *Garnett v. Yoe*, 17 Ala. 74, is directly in point, and we will not depart from it.

The averment of agreement to buy at the sum stated in the complaint, no stipulation for credit being present, imports that the payment should be cash.—*Robbins v. Harris* 31 Ala 160. The counts are sufficiently definite in respect of the payment to be made by the plaintiff. In *Manier v. Appling*, 112 Ala. 663, 20 South. 978 cited for appellant, the counts were silent as to the sum to be paid for the shoes.

No error appears in the record, and the judgment overruling the demurrer is affirmed.

Affirmed.

DOWDELL, C. J., and ANDERSON and SAYRE, JJ., concur.

[Crone & Co. v. Long & Son.]

Crone & Co. v. Long & Son.*Assumpsit.*

(Decided April 8, 1909. 49 South, 227.)

1. *Appeal and Error; Harmless Error; Exclusion of Evidence.*—Where all the evidence taken together, both the excluded and the admitted, will not support a judgment for the plaintiff, the exclusion of evidence offered by him is not prejudicial.

2. *Principal and Agent; Proof of Agency; Declarations.*—Agency cannot be proven solely by the declarations of the agent.

3. *Same; Evidence of Agency.*—Where it appears that the person giving the authority to one to buy for another had no authority to buy for the other or to authorize anyone else to do so, testimony that he had given the person authority to buy goods for the other was not admissible to show the agency of such a person.

4. *Same; Authority of Agent.*—In order to hold principals liable for a purchase made by another as their agent it must appear that such other was their agent to make the particular purchase, and it was not sufficient to show that the other was their agent for any other purpose.

APPEAL from Conecuh Circuit Court.

Heard before Hon. J. C. RICHARDSON.

Assumpsit by Crone & Co., against I. Long & Son.
From a judgment for defendants the plaintiffs appeal.
Affirmed.

JAMES F. JONES, for appellant. The legality and competency of the evidence is for the court, but the weight and sufficiency for the jury.—*Sanders v. Stokes*, 30 Ala. 432; *Hart v. Freeman*, 42 Ala. 567. The evidence offered and suppressed was competent to prove the agency.—*Sellers v. F. Ins. Co.*, 105 Ala. 282. The affirmative charge should not have been given.—*Bates v. Hart*, 124 Ala. 127; *Bowmar v. Rosser*, 123 Ala. 641; *Bufford v. Rainey*, 122 Ala. 565; *Cole v. Propst Bros.*, 119 Ala. 99; *Abbott v. Mobile*, Ib. 595.

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STALLWORTH & BURNETT, and JAMES A. STALLWORTH, for appellee. The court did not err in excluding the evidence as to the purchase. No agency was shown.—*Gamble v. Fuqua*, 42 South. 738; *Galbraith v. Cole*, 61 Ala. 140; *Scarbrough v. Reynolds*, 12 Ala. 252; *Postal T. Co. v. Lenoir*, 107 Ala. 640; *L. & N. v. Hill*, 115 Ala. 334; *Home Protection v. Whidden*, 15 South. 567; *Buist v. Guice*, 96 Ala. 255; *Talladega Co. v. Peacock*, 67 Ala. 253. On these authorities, the court properly gave the affirmative charge.

MAYFIELD, J.—This was an action of assumpsit for goods, wares, etc., alleged to have been sold by plaintiffs to defendants. The complaint declared upon an account, verified by affidavit. The defendants filed the statutory affidavit denying the correctness of the account, and also filed a plea of the general issue. The goods were claimed by plaintiffs to have been bought of them in the city of St. Louis, Mo., by one Miss Carroll, whom they allege and claim to be the agent of the defendants. The goods were shipped by plaintiffs to defendants from St. Louis, Mo., to Evergreen, Ala., but were destroyed by fire while in the express office at Evergreen. There was a judgment in the lower court for the defendants, from which plaintiffs appeal, assigning as error the suppression of certain depositions of J. Crone, a witness for the plaintiffs, the exclusion of certain evidence offered in connection with the oral testimony of one Max Long, and the giving of the general affirmative charge for and at the instance and request of the defendants.

Had there been any evidence in this case tending to show that Miss Carroll was authorized by the defendants to purchase the goods for them, or if there had been any evidence from which it could be inferred that she

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did have authority, it would probably have been reversible error in the court to exclude the part of the evidence in this case which it did exclude; but, if error, it was without injury, for the reason that the general affirmative charge was properly given for the defendants, and should have been given, though this evidence had been admitted. Neither the evidence excluded, that admitted, nor all taken together, was sufficient to support a judgment against the defendants in this case.

There was no evidence, offered or introduced, which was competent or admissible to be considered for the purpose of showing that Miss Carroll was authorized to make this purchase for the defendants. It is true that some of the witnesses for plaintiffs testify that Miss Carroll purchased the goods for the defendants; but it also conclusively appears, by the testimony of these same witnesses and by that of others, that the only knowledge they had of the fact of authority was that Miss Carroll stated to plaintiffs, or their agents, that she was purchasing for these defendants. Agency cannot be proven solely by the declarations of the agent; and, even if it had been shown that she was the agent, there was no evidence whatever to show that she had authority to purchase these goods for the defendants.—*George v. Ross*, 128 Ala. 666, 29 South. 651.

The evidence of the witness Max Long that he gave Miss Carroll limited authority to buy some millinery goods, say \$150 or \$200 worth, was, of course, not admissible for this purpose, for the reason that it appears that Long himself had no authority to purchase for the defendants, nor to authorize any one else so to do, and that, having none himself, he certainly could not confer authority upon another. It was not sufficient to show that Miss Carroll was the agent of the defendants for any purpose; but in order to recover in this case, it was

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necessary to show that she had the authority to make this purchase. There is not a particle of evidence in this case to show that the alleged agent of the defendants was ever authorized to make this purchase of goods, or any other purchase of goods, by the defendants. The fact that a third party, who had no authority himself to make the purchase, had given her authority to purchase, would not, of course, bind the defendants.—*Johnson v. Wilson*, 137 Ala. 473, 34 South. 392, 97 Am. St. Rep. 52.

If the defendants could be liable under this evidence, then it is absolutely in the power of one party to bind another, without his knowledge or consent, or in spite of his efforts to prevent it. It is possible that Miss Carroll had the authority to make this purchase; but there was certainly no evidence which tended to show it save her own declarations and acts—none of which were admissible for the purpose of showing it, unless there had been some evidence of express or implied authority given her by the defendants, or of some word or act of theirs tending to show a ratification. For this reason there could be no error of which the appellants can complain.

The judgment of the Circuit Court is affirmed.

DOWDELL, C. J., and SIMPSON and DENSON, JJ concur.

[Baer & Co. v. Mobile Cooperage & Box Mfg. Co.]

Baer & Co. v. Mobile Cooperage & Box Mfg. Co.

Action for Breach of Contract.

(Decided Feb. 4, 1909. Rehearing denied April 6, 1909.
49 South. 92.)

1. *Sales; Contracts; Consideration.*—Where, in the subleasing of premises an obligation to sell goods was incorporated, which obligation was binding only on the sellers, and the contract to sell was an inducement to the buyers to lease the premises, the obligation to pay refit under the sublease was a valuable consideration, not only for the use of the premises, but for the obligation of the seller to supply the goods.

2. *Same; Implied Warranty; Sale by Description; Caviat Emptor.*—Where goods are sold by description and not by the buyers selection, and without any opportunity of inspection before buying there is ordinarily an implied warranty that they conform to the description in terms, but also that they are not so inferior as to be unsalable among dealers in such goods; and the doctrine of caviat emptor does not apply to such a sale, especially where the seller is the manufacturer or the sale is executory for future delivery.

3. *Same; Breach of Warranty; Remedy of Buyer.*—The buyer may rescind by refusing the goods, may accept the goods and sue for the breach, or may recoup by counter claim for damages for the breach if the seller elects to sue for the price, where there has been a breach of warranty in the sale.

4. *Same; Waiver; Fraud.*—Since the warranty survives the acceptance, the mere acceptance and use of goods by a buyer, even after a knowledge of defect would not prevent the buyer's action upon a warranty or for fraud.

5. *Same; Contract; Construction; Warranty.*—Where a seller and manufacturer agreed to deliver as much shipping cull and mill cull lumber as the buyer should desire to a certain limit, at prices fixed for each, knowing when the contract was made the use to which the buyer desired to put the goods, such seller complied with its contract if it delivered either shipping or mill cull which were merchantable and could be used for the purpose for which they were ordered, and this without any regard to any custom as to size or quality; but the agreement contained an implied warranty that when the seller delivered shipping culls, as shipping culls, it would not substitute mill cull and collect the higher price for shipping culls.

6. *Same; Contract; Silence as to Time of Payment.*—The presumption is that the sale is for cash when the contract of sale is silent as to the time for payment, but this presumption is not conclusive and if the parties treat the contract otherwise, they are governed by the mutual construction given it.

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7. *Same; Breach; Remedy of Buyer; Default of Seller.*—A breach of contract of sale by the buyer for failing to pay for an invoice during a certain year would not excuse a default of the seller for the previous year.

8. *Same; Burden of Proof.*—Where, under a contract to deliver lumber, two kinds of lumber were called for at different prices, in an action for a breach of such contract, if the buyer showed that the seller had commingled the different grades for a fraudulent purpose of collecting the price of the more expensive grade for the cheaper lumber, the burden was upon the seller to show the amount of the higher priced lumber delivered else it could all be considered to be of the cheaper grade.

9. *Same; Action for Breach; Evidence; Non Compliance with Subsequent Agreement.*—In an action for a breach of contract for a sale of lumber, begun by the buyer, and on proof that through subsequent negotiations, the buyer agreed to accept a delivery of a certain amount of other lumber as a substitute for the amount then in default, it was competent for the buyer to show a non compliance on the seller's part with the subsequent agreement, since a failure to deliver the lumber showed a non compliance with what it was understood would be a compliance with the original contract.

10. *Same; Breach of Contract; Damage.*—Where the contract provided for the delivery of two grades of lumber, and there was evidence that the seller was short in delivery 324,000 feet, and that the price had advanced from \$2 to \$4 per M. feet, and that plaintiff's plant had been shut down for thirty days, for lack of material at a loss of \$15 per day, and that there was a discrepancy in inspection from which with the other evidence, the jury would have been authorized to assess \$1,500, and that there were 400,000 feet of uninspected lumber containing a large percentage of the cheaper grade which was charged for as the more expensive grade and there was also evidence from which it could be inferred that the two grades had been mixed by the direction of the seller for fraudulent purposes, a verdict for \$3,500 was not excessive as damages for breach of the contract.

11. *Evidence; Opinion Evidence; Technical Terms.*—Evidence of expert lumber mill men as to the meaning of "mill cull" and "shipping cull" in the customary parlance of mill men was admissible, where it was a question as to the kind of cull delivered, since such terms are technical and not commonly known to courts and juries.

12. *Evidence; Secondary Evidence; Preliminary Proof.*—It is largely in the discretion of the trial court as to the admission of preliminary proof of acts necessarily precedent to the right to introduce secondary evidence of the contents of documents and papers.

13. *Same; Sufficiency.*—Where notice was served on defendant's counsel, and on one of defendants present at the trial, to produce an original letter written defendant, and it was not produced, though its possession is not denied, the court acted within its discretion in permitting the writer to give parol evidence as to the contents of the letter.

12. *Witnesses; Impeachment; Bad Character; Community and Neighborhood.*—Although a witness may reside in Baltimore, if he has an established business in Mobile, and spends much of his time

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there, evidence as to a knowledge of his character in Mobile is admissible as a predicate for impeaching testimony; the words community and neighborhood, having no exact geographical definition, but meaning in a general way, where a witness is well known and has established a reputation, so that the inquiry is not confined to the domicile.

APPEAL from Mobile Circuit Court.

Heard before Hon. SAMUEL B. BROWNE.

Action by the Mobile Cooperage & Box Manufacturing Company against Richard P. Baer & Co. From a judgment for plaintiff, defendants appeal. Affirmed.

The contract, for a breach of which this suit was brought, is as follows: "This witnesseth an agreement made and entered into by and between Richard P. Baer & Co., a partnership composed of Richard P. Baer and M. F. Baer, of Baltimore, Md., and the Mobile Cooperage & Box Manufacturing Company, a corporation organized under the laws of Alabama, as follows: Said Richard P. Baer & Co., lease and rent to the said Mobile Cooperage & Box Manufacturing Company, for a term of one year, beginning from the date hereof, and ending on the 29th day of April, 1913, for a yearly rental of \$500, payable in advance in quarterly installments of \$125 each, the following described real estate, situated in Mobile county, Alabama, to wit: (Here follows a lengthy description of the land, together with the conditions concerning the water front and the use to which it should be put by either party.) It is further agreed that, should the said Richard P. Baer & Co., exercise the option which they have to extend their lease, which covers the above-described property, for a period of five years after the said 29th day of April, 1913, at the increased rental which is provided for in said lease, from Augustin Meaher, then the said Mobile Cooperage & Box Manufacturing Company shall have the option and right to extend this lease for said additional period of five years, by

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paying its proportion of said increased rental, and by giving notice of its purpose to extend said lease as soon as notified by the said Richard P. Baer & Co., that they have exercised their option to extend their lease. In the event the said Richard P. Baer & Co., decide not to exercise their option to extend their lease for said additional period of five years, then they shall transfer such right to the said Mobile Cooperage & Box Manufacturing Company, and shall permit the said company last named to take over the entire lease for said extended period provided that it releases the said Baer & Co., from any and all liability for the rent for such extended period. The said Richard P. Baer & Co., further agree to sell to the said Mobile Cooperage & Box Manufacturing Company as much cull and mill cull hardwood lumber as the said Mobile Cooperage & Box Manufacturing Company may desire to buy from them, up to, but not exceeding 1,500,000 feet per year, at and for the price of \$10 per M for shipping culls and \$5 per M for mill culls, delivered either upon the railroad cars or upon the 20-foot right of way hereinbefore mentioned. In the event that it takes and purchases as many as 1,000,000 feet of said cull or mill lumber in any one year, then said Baer & Co., shall refund to it the entire \$500 of rent paid for that year. (Then follows a covenant on the box factory's part not to increase the insurance of it by any extrahazardous use, etc., a reservation in the lessee of the right to remove the buildings, etc., at the expiration of the lease, and a stipulation to hold subject to the terms of the lease under which Baer & Co., held.)" The breach alleged is that during the year 1906-07, from February to February, the plaintiff exercised the right conferred by the contract to buy from the defendant the 1,500,000 feet of cull and mill cull hard lumber, the notification to Baer & Co., of such election to pay, and their

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agreement to deliver said hardwood culls at the stipulated price, and that orders were given and accepted from time to time for immediate delivery, and, although plaintiff was at all times willing and ready to accept and pay for said lumber the defendant refused and wholly failed to deliver 324,000 feet, etc. The testimony was in sharp conflict, and a sufficient statement of it is made in the opinion of the court.

PILLANS, HANAW & PILLANS, for appellant. The contract was entirely lacking in mutuality, was a nudum pactum was void whenever defendant should decline to deliver upon an order given.—*James v. Stiggins*, 13 Ala. 830; *Collins v. Abel*, 44 South. 109; *Collins v. Smith*, 43 South. 838; *Howard v. E. T. V. & G. R. R. Co.*, 91 Ala. 269; *Comer v. Bankhead*, 70 Ala. 136; *Whitworth v. Hart*, 22 Ala. 343; *Lewis v. Lane*, 1 Ala. 335; *Eskridge v. Glover*, 5 S. & P. 264; 117 Fed. 474; 114 Ib. 77; 105 Ib. 869; 68 Ib. 791; 43 N. Y. 240; 12 How. 136. There is no warranty possible in this case.—45 N. Y. 265; 29 Ib. 358; 108 Ib. 232; 128 Ib. 593; 53 Ib. 519; 106 Ib. 90; 115 Ib. 539; 167 Ib. 48; 67 S. W. 13; 16 Ib. 81; 40 Wis. 37; 2 Benj. on Sales, sec. 935; Sec. 1267, 814, 815, 851, 871-4; 73 Am. Dec. 305. Hence, the court erred in sustaining demurrers to the 5th and 7th pleas. When a contract is clear and unambiguous, the question of custom vel non becomes immaterial.—*Shelby I. Co. v. Deprec*, 147 Ala. 602; *B. & A. R. R. Co. v. Maddox*, 46 South. 780; *Byrd v. Bell*, 43 South. 751; *Kuhl v. Long*, 102 Ala. 563; 10 Wall. 383; 109 U. S. 278; 134 U. S. 306; 14 Wall. 602; 2 C. & J. star page 244. Under the contract the law implies that the sale is for cash.—*Robbins v. Harrison*, 31 Ala. 160; *Adair v. Stovall*, 148 Ala. 467; 181 Mass. 134; 52 Am. Dec. 288. The court erred in refusing requested charges E. and H.—*Brigham v. Carlisle*,

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78 Ala. 243; *Bell v. Reynolds*, Ib. 514; *Beck v. West*, 87 Ala. 213; *Reid L. Co. v. Lewis*, 94 Ala. 628; *Moulthrop v. Hyatt*, 105 Ala. 495; *Nichols v. Rash*, 138 Ala. 377. A sufficient predicate was not laid for the introduction of secondary evidence which was introduced.—14 M. & W. 250; 43 N. W. 592; Elliott on Evidence, (vol. 2) secs. 1410, 1421 1427-8. The contract is clear and unambiguous and the court erred in the admission of evidence relative thereto.—10 Wall. 367; 17 Fed. 13; 137 U. S. 528; 50 Fed. 764. The court should not have permitted the general reputation of M. S. Bear in Mobile to be shown.—*Jackson v. The State*, 106 Ala. 17; *Holmes v. The State*, 88 Ala. 26; *Hadjo v. Gooden*, 13 Ala. 721; *Sorrell v. Craig*, 9 Ala. 534. The court should have given charge 7.—*Goldsmith v. The State*, 105 Ala. 12; *Dabney v. The State*, 113 Ala. 38; *Abrams v. The State*, 46 South. 464.

GREGORY L. & H. T. SMITH, for appellee. The contract was not void. A promise to buy will support a promise to sell, but the promise to sell may be supported by any other valuable consideration that may be given.—*Wilkes v. G. P. R. R. Co.*, 79 Ala. 180; *Moses v. McLean*, 82 Ala. 370; *Ross v. Parks*, 93 Ala. 153; *Morris v. Lagerfelt*, 103 Ala. 608; *Young v. Latham*, 132 Ala. 341; 136 Ala. 303. The lease constituted a valuable consideration.—*Christian & Craft Groc. Co. v. Bienville W. Sup. Co.*, 106 Ala. 124; *Hawralty v. Warren*, 18 N. J. E. 126; 22 A. & E. Ency of Law, 1020; 26 Ib. 30; 128 U. S. 50; 53 N. W. 249. A sale by description carries with it a warranty that the goods delivered will accord with the description by which they are sold.—*Gache v. Warren*, 72 Ala. 288; *Frith v. Holland*, 133 Ala. 586; *Brown v. Freeman*, 79 Ala. 410; *Eagan & Co. v. Johnson*, 82 Ala. 233; *Young v. Arndt Bros.*, 86 Ala. 116; 15 A. & E. Ency.

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of Law, 1255; 104 N. C. 582; Benj. on Sales, secs. 1261-2. The doctrine of caveat emptor cannot be applied.—Authorities *supra*. The court did not err in permitting testimony relevant to the appellant's effort to deliver green hardwood lumber.—*Frith v. Holland, supra*; *Gache v. Warren, supra*; *Perry v. Johnson*, 59 Ala. 648. Whenever a technical expression is used in the contract to designate a certain classification of articles there necessarily arises such an ambiguity as calls for parol testimony in the construction of the contract.—*McClure v. Cox*, 32 Ala. 617; *Cannon v. Hunt*, 116 Ga. 453; *Hinote v. Brigham*, 33 South. 303. There was no error in the ruling as to the thickness of the lumber.—*Barlow v. Lambert*, 28 Ala. 709; *Kuhl v. Long, supra*; 102 Ala. 564; *Wilkerson v. Williamson*, 76 Ala. 163; *Jones v. Forth*, 36 Ala. 460. It appears from the contract and the testimony that appellants made the sale knowing that the timber was to be used in a box factory, and it follows that it warranted the timber sold to be reasonably fit for the purpose it was sold.—*McCaa v. Ealam D. Co.*, 114 Ala. 74; *Englehart v. Clanton*, 83 Ala. 336; *Perry v. Johnson, supra*; *Gache v. Warren, supra*. Even a delay or refusal of payment of one installment will not justify the entire rescission of the contract since it calls for deliveries by installments and payment for each delivery.—*Sims v. Ala. B. Co.*, 132 Ala. 312; *Worthington v. Givinn*, 119 Ala. 52; *Johnson v. Allen*, 78 Ala. 300. The court did not err in admitting the evidence of custom.—*M. & E. R. R. Co. v. Cobb*, 73 Ala. 401; *E. T. V. Johnson*, 75 Ala. 604 *Haas & Bro. v. Hudmon & Bro.*, 83 Ala. 176. He who has been the instrument of loss to another should bear the same.—123 Mass. 55; *Ib.* 58; *Ib.* 60; 8 Cyc. 571; 6 A. & E. Ency of Law, 594. Counsel discuss other assignments of error, and criticise authorities cited by appellant. They insist the court properly

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allowed the evidence as to the general reputation of Baer in Mobile.—*McQueen v. The State*, 108 Ala. 54; *Prater v. The State*, 107 Ala. 26.

ANDERSON, J.—While the obligation to sell the culls was binding only on the defendants, it being optional with the plaintiffs to order or not as they saw fit, and would be wanting in mutuality, if this clause was the entire contract, or was in no way dependent upon or collateral to the lease, in which it was incorporated, they were both embodied in the same instrument, and the agreement to supply the culls was no doubt an inducement to the plaintiff to lease the property, and the obligation to pay rent therefor was a valuable consideration, not only for the use of the plant, but for the obligation on the part of the defendant to supply the culls.—*Christian & Craft Co. v. Bienville Water Co.*, 106 Ala. 124, 17 South. 352; *Merrett v. Coffin* 152 Ala. 474, 44 South. 622; *Hawralty v. Warren*, 18 N. J. Eq. 126, 90 Am. Dec. 613; 26 Am. & Eng. Ency. Law, 30.

Where goods are sold by description, and not by the buyer's selection or order, and without any opportunity for inspection (inspection before purchase), there is ordinarily an implied warranty, not only that they conform to the description in kind and specie, but also that they are "merchantable"—not that they are of the first quality, or of the second quality, but that they are not so inferior as to be unsalable among merchants or dealers in the article; i. e., that they are free from any remarkable defect. In such sales the doctrine of caveat emptor does not apply. This is especially true when the vendor is the manufacturer, or the sale is executory for future delivery.—Benj. on Sales (7th Ed.) 685, and authorities cited in note 15; *Gachet v. Warren & Burch*. 72 Ala. 288. It is also settled law that, when there is a

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breach of warranty, in the sale of goods, the buyer may rescind the sale by refusing the goods, etc., or he may accept the goods and bring an action for breach of warranty, or he may recoup by way of counterclaim damages for breach of warranty in the vendor's action for the price.—*Eagan Co. v. Johnson*, 82 Ala. 233, 2 South. 302; *Frith v. Hollan*, 133 Ala. 583, 32 South. 494, 91 Am. St. Rep. 54; *Brown v. Freeman*, 79 Ala. 410. Nor does the mere fact of acceptance and use of the goods, even after knowledge of the defect, prevent a resort to an action upon a warranty or for fraud. The warranty survives the acceptance. It has been said: "The buyer need not return the goods, nor offer to do so, nor give any notice, in order to sue upon his warranty." While this rule does not obtain in England, it does in a majority of the American states, and has not only been adhered to by recent authorities in Alabama, but was followed in the early cases of *Cozzins' v. Whitaker*, 3 Stew. & P. 322, and *Milton v. Rowland*, 11 Ala. 732. As is said by Mr. Benjamin, in his valuable work on Sales (7th Ed., p. 961): "No doubt a failure to return the goods, or notify the vendor of the defect, after sufficient opportunity to examine them, may be some evidence that no defect existed, but it is not a condition precedent to the action, nor in law a waiver of the warranty, though some states seem to hold it so, especially in executory contracts and where the defect is apparent." As an original proposition, the writer would adhere to the exception as being conducive of prompt and fair dealings between buyer and seller; but the rule has been too well established in this and other states to depart from it at this late day. The trial court did not err in sustaining the demurrer to special pleas 5 and 7.

The contract, in the case at bar, was plain and unambiguous in so far as setting out the obligation of the de-

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endants. They were to deliver not exceeding 1,500,000 feet of culls, "shipping culls at \$10 per thousand and mill culls at \$5 per thousand." The defendants, therefore, complied with their contract if they delivered either shipping or mill culls which were merchantable and could be used for the purposes for which they were ordered, as the defendants were the manufacturers and knew at the time of making the contract the use to which the plaintiffs desired to put them. It would, therefore, matter not whether they were green or dry, or thick or thin, if they were mill culls or shipping culls and were merchantable and adaptable to the uses for which they were ordered. The plaintiffs could show that they were not mill or shipping culls, were unmerchantable or unfit for the use for which they were ordered, but could not fasten, by proof of custom, a warranty not implied by law from the terms of the contract. The defendants did not undertake to deliver culls of the customary or standard size or quality, but to deliver merchantable mill and shipping culls and such that could be used in the plaintiffs' factory. The defendants did undertake however, to furnish "mill culls" and "shipping culls," and there was an implied warranty that, when they delivered shipping culls as shipping culls, they would not deliver mill culls and collect for shipping culls. The terms "mills culls" and "shipping culls" are technical, and not commonly known to courts and juries, and there was considerable controversy as to the kind of culls delivered, whether mill or shipping culls. It was therefore permissible for the plaintiffs to show, by expert mill men, the meaning of these terms in the customary and ordinary parlance of mill men, in order to enable the jury to classify and differentiate mill culls from shipping culls—to determine how many of each were delivered, and whether or not any of them were unmerchantable

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or unfit to be used by the plaintiff for the manufacture of boxes, etc.—*McClure v. Cox & Co.*, 32 Ala. 617, 70 Am. Dec. 552.

It may be true that, when the contract for the sale of a thing is silent as to time of payment, the law will ordinarily presume that it was for cash; yet this is not conclusive, and if the parties, by their conduct, treat it otherwise, they have the right to do so, and are bound by the mutual interpretation or construction given the matter. The plaintiffs, therefore, had the right to show that throughout their dealings with the defendants they had not been demanding or collecting the cash upon delivery, but had a fixed custom of striking balances and collecting 60 days after the respective deliveries. Moreover, the default assigned by the defendants in the letter of April 17, 1907, as a breach in failing to pay an invoice of April 11, 1907, was subsequent to the year covered by the complaint, to wit, from the 3d of February, 1906, and ending February 2, 1907. A breach made by the plaintiffs during a subsequent year would not excuse a default by the defendants for the previous year. The contract did not provide for any specified amount of mill or shipping culls, but only for an aggregate number of feet, consisting of both grades. The defendants, however, contracted to deliver mill culls at \$5 per thousand, and if they fraudulently deliver them as shipping culls, and collected \$10 per thousand, they breached the contract in collecting \$10 for the thing they agreed to sell for \$5 per thousand. It is true the evidence was not definite as to the exact number of mill culls that were passed off for shipping culls, but estimates were given, which furnished some data for the jury to assess damages; and charges E and H, requested by the defendants, were properly refused. Moreover, if the plaintiffs showed a commingling of the culls by the defendants

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for a fraudulent purpose, it was incumbent on them to show the number of shipping culls, and, failing to do so the loss should fall upon them.

The only insistence of error, as to Shertzer's testimony, of what he wrote defendants, is because no predicate was established for the introduction of parol evidence. Notice was served on counsel, and one of the defendants was present at the trial, to produce the original. Its receipt or possession was not denied. Preliminary proof of the acts regarded as necessarily precedent to the right to introduce secondary evidence of the contents of papers and documents is addressed largely to the discretion of the trial court.—2 Elliott on Ev. § 1420. It is true an abuse of the discretion would be revisable; but we are not prepared to say that it was abused in the present instances.

There was no error in permitting the plaintiffs to show a noncompliance by the defendants with the subsequent agreement to deliver 200,000 feet of culls. It is true the action is on the original contract; but there was proof that through subsequent negotiations plaintiffs were willing to accept a delivery of said 200,000 feet as a substitute for the amount then in default, and a failure to deliver said 200,000 feet showed a noncompliance with what it was understood would be a compliance with the original contract.

The general rule is that, in order to impeach a witness by proof of bad character, the predicate is a knowledge of his character in the community or neighborhood in which he resides; but the term "community" or "neighborhood" is not susceptible of exact geographical definition, but means in a general way where the person is well known and has established a reputation. The inquiry is not necessarily confined to the domicile of the witness, but may extend to any community or society

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in which he has a wellknown or established reputation. It is a matter of common knowledge that many men have their domicile at one point and business at another, spend much of their time at the latter, and in fact have a better established reputation there than at the place of their actual domicile.—*McQueen v. State*, 108 Ala. 54, 18 South. 843. The proof showed that, while Baer resided in Baltimore, he had an established business in Mobile, and spent much of his time there, and it was permissible for the witness to testify as to a knowledge of his character in Mobile.

The trial court did not commit reversible error in refusing charge 7 requested by the defendants.—*Morris v. McClellan*, 154 Ala. 639, 45 South. 641; *Scott v. State*, 133 Ala. 117, 32 South. 623; *Davis v. State*, 152 Ala. 25, 44 South. 561.

We are not prepared to say that the verdict of the jury was manifestly or palpably excessive, or that it was not supported by the evidence. There was proof that the defendants were short in delivery 324,000 feet, and that the price had gone up from \$2 to \$4 per thousand. There was also evidence that plaintiffs' plant was shut down about 40 days, 30 days of said shut-down being caused by want of material, and at a loss of \$15 per day. There was a discrepancy in the inspection of Childs, which, considered with the foregoing items, supplied data from which the jury could assess over \$1,500 damages; and this estimate as to the discrepancy in the inspection is upon the basis that the inspection was conclusive on the plaintiffs, when as matter of law it was but an evidential or presumptive fact of the extent of the discrepancy. There was also proof that more than 400,000 feet of uninspected culls had been delivered and charged for as shipping culls, when in fact they contained a large percentage of mill culls. (One witness said the percentage

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was very large, and another said at least three-fourths of what was delivered as shipping culls were mill culls.) There was also evidence from which the jury could infer that they were so confused or mixed under the direction of the defendants and for a fraudulent purpose. We think it a sound proposition of law that, when a vendor so commingles or confuses one quality of goods with another, for a fraudulent purpose and in such a manner that they cannot be classified or separated by the jury, they will be warranted in holding all to be of the inferior grade.—6 Am. & Eng. Ency. Law, 571; 8 Cyc. 594; *Alley v. Adams*, 44 Ala. 610; *Burns v. Campbell*, 71 Ala 288. Conceding, however, that the jury should have assessed only three-fourths of the uninspected culls, which were delivered as shipping culls, as mill culls, this would have afforded data of damage exceeding \$1,500, which, added to the other items, would justify the verdict.

The trial court did not err in refusing the motion for a new trial, and, no reversible error having been committed during the trial, the judgment of the circuit court must be affirmed.

Affirmed.

TYSON, C. J., and DOWDELL and McCLELLAN, JJ., concur.

[Byrd v. Hickman.]

Byrd v. Hickman.*Assumpsit.*

(Decided Feb. 18, 1909. 48 South, 669.)

Frauds; Statute of; Promise to Pay Debt of Another.—A promise to pay another's debt, based on no other consideration than the creditor's forbearance to press the original debtor, is a collateral undertaking within the statute of frauds, and not an original obligation on the part of the promisor.

APPEAL from Geneva County Court.

Heard before Hon. ALBERT E. PACE, Special Judge.

Assumpsit by P. N. Hickman against R. E. Byrd. From a judgment for plaintiff defendant appeals. Reversed and remanded.

C. D. CARMICHAEL, for appellant. The promise was within the statute of frauds and was not binding on Byrd.—*Westmoreland v. Porter*, 75 Ala. 453; *Webb v. Hawkins*, 101 Ala. 630; *Lindsey v. McRae*, 101 Ala. 630; *Clark v. Jones*, 85 Ala. 127; 9 Cyc. 347; *Johnson v. Sellers*, 33 Ala. 365; *Morrell v. Quarles*, 35 Ala. 544; 98 Ala. 473; *Reid v. Rowan*, 107 Ala. 366; *Altman & Co. v. Fletcher*, 110 Ala. 452. On the authorities above cited the court erred in the admission of testimony.

W. O. MULKEY, for appellee. It was not necessary to declare specially upon the contract made as there was no duty to be performed except the payment of the money by the defendant to the plaintiff, and the evidence tended to support the 1st count of the complaint.—*Holloway v. Tolbert*, 70 Ala. 389; *Jones v. King*, 81 Ala. 385; *Stafford v. Sidney*, 106 Ala. 189. The promise made by defendant to Mrs. Lewis to pay the debt which

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she owed plaintiff was supported by a valuable consideration and inured to the benefit of the defendant on which he could maintain an action.—*Huckabee v. May*, 14 Ala. 263; *Moore v. First Nat. Bank*, 139 Ala. 595; *Mason v. Hall*, 30 Ala. 599; *Coleman v. Hatcher*, 77 Ala. 217; *Dimmick v. Register*, 92 Ala. 458; *Potts v. First Nat. Bank*, 102 Ala. 286.

MCCLELLAN, J.—The plaintiff (appellee) as a witness thus states the alleged engagement between himself and the defendant, Byrd, upon which is predicated his complaint, composed of a common count and one averring liability arising from the special promise: "I held a note and mortgage on Mrs M. J. M. Lewis, executed by her and her husband to me for a loan of money to Mrs. Lewis, executed on the 6th day of March, 1906. for \$120.70 and due the 1st of October, 1906." After telephonic inquiry and negotiations, there being no writing in the premises, between plaintiff and defendant, in which plaintiff declared that he could not wait on the mortgagees another year, plaintiff, testifying, proceeds: " * * * Defendant resumed his conversation with me, * * * and said that if I could wait on the Lewises for said amount until January 1, 1907, and look to the Lewises for the interest between October 1st and January 1st, he would taken the matter up on January 1st. I then said, 'On your promise to pay it on January 1st I will wait.' To this defendant said to me, 'All right,' and we each rang off. * * *" There was testimony introduced the tendency of which was to show that defendant, prior to the quoted agreement, induced Mrs. Lewis to pay him \$75 on her indebtedness to him on the assurance that he would help her pay the debt to plaintiff when it matured. The court, however, at the instance of the defendant, instructed the jury specially that they

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could not predicate a finding for plaintiff upon the promise alleged to have been made by defendant to Mrs. Lewis. The Statute of frauds (Code 1896, § 2152, subd. 3) was pleaded, and was, in our opinion, sustained, as appears from the quotation from the testimony of the plaintiff himself, in the light of the status created by the giving of the special instruction referred to. It is unnecessary for us to enter upon any extended discussion of this phase of our statute of frauds. It will suffice here to briefly state the reason for the conclusion just announced.

The only question, in this aspect of the case, is: Was the agreement detailed by plaintiff within the statute; or, more minutely stated, was it a new and independent agreement, between plaintiff and defendant, based upon a new and independent consideration, to which the payment of the Lewis debt was a mere incident? If it was not a new and independent agreement, the statute is offended in the failure to reduce it to writing as the statute requires. It is perfectly evident that the Lewis obligation was not discharged, or the debtors released, in any sense; for the agreement detailed prescribed that plaintiff should look to the debtors for the interest on the debt in the interim between October 1st and January 1st. And it is just as evident that the only consideration to support the agreement, between plaintiff and defendant, to pay the Lewis debt, was the forbearance by plaintiff to enforce payment of his debt against the debtors until January 1st. That such a forbearance is a consideration capable of supporting a contract to pay another's debt, and also that a contract to pay another's debt importing that consideration only is within, and, if not in requisite writing, condemned by, the statute of frauds, was expressly decided by this court in *Westmoreland v. Porter*, 75 Ala. 452. Therein it is said: "While

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the forbearance of a creditor to enforce his demand is undoubtedly a sufficient consideration for the guaranty of the debt of another, yet it is precisely one of that class of considerations which is required by the statute to be expressed in the written agreement, and is uniformly held not to take the defendant's promise out of the influence of the statute."—*Musick v. Musick*, 7 Mo. 495; *Hilton v. Dinsmore*, 21 Me. 410; *Martin v. Black*, 21 Ala. 721. Such a forbearance does not evidence a new and independent contract from that of the original obligation to the creditor. It is a mere collateral undertaking to pay the debt of Lewis in this instance, and hence within the statute.

As indicated, we take no account, in attaining the conclusion stated, of the alleged promise, both affirmed and denied in the testimony, of the defendant to Mrs. Lewis. See *Hilton v. Dinsmore*, 21 Me. 410; Browne's St. Frauds, § 187, § 212, and notes.

The judgment is reversed, and the cause is remanded.

ANDERSON, DENSON, and SAYRE, JJ., concur. DOWDELL, C. J., and SIMPSON, J., dissent.

Equitable Life Assurance Society of U. S. v. Golson.

Action on Insurance Policy.

(Decided Feb. 4, 1909. Rehearing denied April 6, 1909.—48 South. 1084.)

1. *Insurance; Life Insurance; Forfeiture; Failure to Pay Premium.*—Unless the policy so provides, the failure to pay the premium does not forfeit the contract.

2. *Same.*—Within the limitation of the statute, a condition that a life policy shall be forfeited for non payment of any premium is a

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condition subsequent, and non performance avoids the policy unless waived.

3. *Same.*—A condition in a life policy providing a forfeiture for non payment of premium is for the benefit of the insurer, and strictly construed; a forfeiture will not be enforced unless such is the plain meaning of the contract.

4. *Same.*—Where the policy provides that on default in any annual premium after the 3rd premium has been paid, the policy may be surrendered for a non participating paid up policy, providing the policy be returned to the insurer within six months after date of default, otherwise the policy shall cease, does not provide a forfeiture of the policy within six months from default; after default insured has under such provision six months in which to elect, to surrender the policy and get paid up insurance or to pay the premium, should he decide not to surrender the policy; on failure to elect the policy does not become forfeited for six months after default.

APPEAL from Geneva Circuit Court.

Heard before Hon. H. A. PEARCE.

Action by Mary W. Golson against the Equitable Life Assurance Society of the United States to recover on a life policy. From a judgment for plaintiff, defendant appeals. Affirmed.

The suit was for the sum of \$2,500, the face of the policy. The pleas admitted an indebtedness of \$909.60 as paid-up insurance under the terms of the policy, but sought to defeat a recovery upon pleas setting up the conditions of forfeiture,, which are fully set out in the opinion of the court. The proof showed that the insured died on the 8th day of June, 1907, and that the defendant had notice of the same, and that the annual premium was payable on or before the 7th day of March in each year, default in which occurs six months after said date.

O. D. CARMICHAEL, for appellant. The court, in order to avoid a forfeiture, cannot go farther than a fair construction of the language used will permit.—25 Cyc. 740. By a failure to pay a forfeiture happened.—*Imperial L. Ins. Co. v. Glass*, 96 Ala. 568; 25 Cyc. 828; *Brooklyn L. I. Co. v. Bledso*, 52 Ala. 551. A failure to

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pay at maturity works a forfeiture.—2 May on Insurance parag. 341 and 729. The following case contained a forfeiture provision substantially the same as the case at bar.—*Equitable L. A. S. v. Babbett*, 89 Pac. 531; *Inloes v. Prudential I. Co.*, 82 S. W. 1089. A forfeiture would result in a failure to surrender the policy within the six months period.—117 U. S. 411.

W. O. MULKEY, for appellee. Failure to pay premium on insurance does not of itself forfeit the contract unless the policy or some part thereof provides.—7 Ohio S. & C. P. Dec. 118; 62 N. Y. Sup. 553; 104 Ga. 256; 212 Ill. 134; 25 Cyc. 828; 2 May on Ins. The conditions leading up to the forfeiture must clearly and certainly exist before it can be invoked by the company.—3 Cooley's Brief On Ins. p. 2259; 187 Mass. 8; 127 Fed. 651. Where the assured died before the expiration of the period of grace without having made the payment the right of recovery on the policy is not affected.—*McMaster v. N. Y. Ins. Co.*, 90 Fed. 400; *Lovell v. St. L. M. L. Ins. Co.*, 111 U. S. 264; 25 Cyc. 790.

ANDERSON, J.—It has been almost universally held that the failure to pay the premium on an insurance policy does not, of itself, forfeit the contract, unless the policy so provides.—25 Cyc. 824, and authorities cited in note 64. It is true the policy may contain a valid condition, within the limitation of the statute, that it may be terminated or forfeited upon a failure to pay any premium or installment at the time specified in the contract, which would be a condition subsequent, and the nonperformance of which would avoid the policy, unless waived by the insurer. Such a condition, however, being for the benefit of the company, is to be strictly construed, and a forfeiture will be enforced only when

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it appears that such is the plain intent and meaning of the contract; and if there are repugnant conditions the court will enforce such as are in favor of the insured and will prevent a forfeiture.—8 Cyc. 821; *Ferguson v. Union Mutual Co.*, 187 Mass. 8, 72 N. E. 358; *McMaster v. Life Ins. Co.* (C. C.) 90 Fed. 40.

The pleas in the case at bar do not attempt to defeat a recovery upon the policy entirely, as they concede the plaintiff's right to recover the surrender value of the policy, but claim that the original policy was forfeited for nonpayment of the premium, which matured less than six months before the death of the insured. The forfeiture relied upon in the pleas is as follows: "If premiums upon the policy for less than three complete years of assurance shall have been duly received by the society, and default shall be made in the payment of a subsequent premium, the policy may be surrendered for a nonparticipating paid-up policy, for the entire amount which the full reserve on the policy, according to the present legal standard of the state of New York, will then purchase as a single premium, calculated by the regular table for single-premium policies, now published by the society, provided that the policy be returned to the society duly receipted within six months after the date upon which the last premium in default has fallen due; otherwise, the policy shall cease and determine, and all premiums paid thereon shall forfeit to the society."

We do think that this clause provides for a forfeiture of the policy inside of six months after default in the payment of the premiums, unless the insured during that time surrenders the policy and gets a paid-up one under the terms of the contract, and thus releases himself from liability for unpaid premiums. In other words, the clause means that after default in any premium, after the third one, the insured has six months within

[*Spurlin Mercantile Co. v. Lauchheimer & Sons.*]

which to elect to surrender the policy and get paid-up insurance, to the extent of what he has paid in, or to pay the premium, should he decide not to surrender the policy, and when he has failed to so elect, notwithstanding the premium is unpaid, the policy does not become forfeited for six months after said premium becomes due. The policies considered in the Alabama authorities cited by counsel for appellant contained a clause making the life of the policy dependent upon the payment of the premiums.

The special pleas failing to show that the original policy had been forfeited before the death of the insured, the trial court properly sustained the demurrer thereto. The judgment of the circuit court is affirmed.

Affirmed.

TYSON, C. J., and DENSON, McCLELLAN, and MAYFIELD, JJ., concur.

Spurlin Mercantile Co. v. Lauchheimer & Sons.

Assumpsit.

(Decided Feb. 11, 1909. 48 South. 812.)

Judgment; Default Judgment; Corporation; Recitals.—A judgment by default against a corporation must show the fact that proof was made to the court and that the court ascertained that the person on whom process was served was such an officer or agent of the corporation as by law was authorized to receive service of process for and on behalf of the corporation.

APPEAL from Andalusia City Court.

Heard before Hon. B. H. LEWIS.

Assumpsit by M. H. Lauchheimer & Sons against the Spurlin Mercantile Company. There was a default judg-

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ment for plaintiffs, and defendant appeals. Reversed.

The summons and the complaint were issued to and filed against the Spurlin Mercantile Company, a corporation, and the judgment was by default; the judgment entry being as follows: "Come the plaintiffs, in person and by attorney, and, the defendant being called, came not, but made default; and upon motion of the plaintiffs it is considered and adjudged that the plaintiffs have judgment against the defendant for the amount of their damages; and, the amount of the damages being certain, it is thereupon considered and adjudged by the court that the plaintiffs have and recover of the defendant the sum of \$71.25, and the costs of this suit, for which let execution issue."

PARKS & RANKIN, for appellant. The judgment rendered was erroneous for the following reasons:

First. The complaint was filed against a corporation, and judgment was rendered by default, and the judgment fails to recite that proof was made that the service of the summons and complaint was made upon a proper officer or agent of the corporation.—121 Ala. 295, and cases cited thereunder.

Second. The complaint shows that the suit was on an open account and that the account sued upon was duly verified by affidavit; there was a judgment by default against the defendant corporation, and the judgment fails to recite that the verified statement of account sued on was on file, or that it was introduced in evidence, and it further fails to show that a writ of inquiry was executed. Citing Code 1907, Section 3971, *Greer & Walker et al v. Lippfert Scales Company*, 47 Sou. Reporter; and 76 Ala. 372.

S. H. GILLIS, for appellee. No brief came to the Reporter.

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ANDERSON, J.—It has been often held by this court that, to maintain a judgment by default against a corporation, the record or judgment entry must recite the fact that proof was made to the court that the person on whom process was served was at the time of service such an officer or agent of the defendant as by law, was authorized to receive service of process for and in behalf of the defendant.—*Southern Home Co. v. Gillespie*, 121 Ala. 295, 25 South. 564, and cases cited. The judgment entry discloses no such fact in the case at bar, nor does it appear elsewhere in the record. Yet the defendant is sued as a corporation.

The judgment of the city court is reversed, and the cause is remanded.

Reversed and remanded.

DOWDELL, C. J., and McCLELLAN and MAYFIELD, JJ., concur.

Stay v. Tennille.

Specific Performance.

(Decided April 15, 1909. 49 South, 238.)

1. *Contracts; Option; Mutuality.*—An option is unilateral until it has been exercised by the party claiming it, and hence, it is no objection to an option contract that it is wanting in mutuality.

2. *Specific Performance; Contracts Enforcible; Certainty; Time of Performance.*—Where the owners of stock agreed that if any one of the parties desired to sell his stock in the enterprise he should first offer the same to the other parties owning stock, and on the death of any party his heirs, executors or administrators should sell to the other parties owning stock the decedent's stock to the amount of \$5,000, or all of decedent's stock if it should be less than that amount, and this at the option of other parties owning stock, before offering the same on the market, the contract was indefinite as to the time when the right of option to purchase would arise, and unless the bill renders the tenure definite by an averment of an offer

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by the administratrix to sell the stock or of any intention on her part to sell the same, the contract is unenforcible specifically against the administratrix of such estate, as to the sale of the stock.

APPEAL from Montgomery Chancery Court.

Heard before Hon. L. D. GARDNER.

Bill by E. W. Stay against Sarah B. Tennille, administratrix of the estate of A. St. C. Tennille, deceased, to specifically enforce a contract. From a decree sustaining demurrer to the bill complainants appeal. Affirmed.

HOLLOWAY & BROWN, for appellant. Mrs. Tennille as administratrix has complete power to sell and dispose of the stock, except in so far as she may be controlled by the terms of the contract, and if she sells in spite of the contract to an innocent purchaser the complainant's only remedy would be by an inadequate suit for damages.—Sec. 3472, Code 1907; 56 Ala. 461; *Bank v. Sanford*, 43 South. 226. The contract should not be so construed as to impute to the makers any such absurdity as that contended for.—9 Cyc. p. 586. It must affirmatively appear that the parties regarded time or place as an essential element in their agreement.—20 How. 94; 128 U. S. 403. When no time is fixed, the law implies a reasonable time.—114 Ala. 343. The death of Dr. Tennille did not dissolve or discharge the contract.—*Dahm v. Barlow*, 93 Ala. 120; 11 A. & E. Ency of Law, 939; 8 Id. 1007; 18 Cyc. 241; 9 Id. 293. An option is an assignable contract.—*Hannah v. Ingram*, 93 Ala. 482. This contract is not open to attack on the ground of want of mutuality.—21 A. & E. Ency of Law, 928, et seq.; 9 Cyc. 333; 6 L. R. A. (N. S.) 397; *Moses v. McLean*, 82 Ala. 370; *Iron Age Pub. Co. v. W. U. T. Co.* 83 Ala. 498; Brown Statute of Frauds, sec. 366. The idea was that the control of the corporation should not

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pass into other hands.—6 Pom. Eq. Jur. secs. 748 and 752. The law implies a reasonable charge where no price is fixed.—10 Bing. 376; Id. 482; 24 A. & E. Ency of Law, 1036; 9 Cyc. 250; 154 Ill. 688; 138 U. S. 1. Uncertainty may be cured by the acts of the party.—26 A. & E. Ency of Law, 38.

FRED S. BALL, for appellee. A test of the bill by the principles declared in the authorities following will disclose several deficiencies which must prevent the complainant from succeeding in this cause.—6 Pom. Eq. Jur. secs. 744-764; 26 A. & E. Ency of Law, 34 and 37; *Manning v. Myer*, 77 Fed. 690. There is a lack of mutuality of obligation and remedy between the parties to the alleged contract.—*Chadwick v. Chadwick*, 121 Ala. 582; *Iron Age v. W. U. T. Co.*, 83 Ala. 509; *Ervin v. Bailey*, 72 Ala. 467.

DOWDELL, C. J.—This is a bill by the complainant, appellant here, against the respondent, Sarah B. Tennille, as the administratrix of A. St. C. Tennille, deceased, seeking a specific performance of a contract entered into by and between the complainant and the respondent's intestate and one I. S. Stanton. The contract, specific performance of which is sought by the bill, is as follows: "State of Alabama, Montgomery County. Whereas, A. S. St. C. Tennille, E. W. Stay, and I. S. Stanton are owners of stock in the Planters' Cotton Oil Company, corporation; and whereas, it is the desire of each party to advance the interest of said corporation and the individual interest of each other by co-operation and otherwise: Now, therefore, know all men by these presents, that the said A. St. C. Tennille, E. W. Stay, and I. S. Stanton, for and in consideration of the premises, mutual interest and protection to each other, and the

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sum of one dollar from each to the others in hand paid, the receipt whereof is hereby acknowledged, do hereby agree and bind ourselves, our heirs, executors, and administrators, as follows, to wit: First. It is hereby agreed and understood, by and between the parties hereto, that in the event either party desires to sell and dispose of his stock in the Planters' Cotton Oil Company, or any part thereof, he shall first offer the same for sale to the other two parties, or either of them, and give them the option to buy said stock before offering the same to any one else or placing it upon the market. Second, It is further agreed that in the event either party hereto should die, owning stock in said Planters' Cotton Oil Company, then his heirs, executors; or administrators shall sell and transfer to the other two parties, or either of them, his said stock to the extent of five thousand dollars, or all of said stock, if the same should be less than five thousand dollars, at their option, before offering the same to any one or placing the same upon the market. Witness our hands," etc. The purposes and intentions of the parties in entering into the said contract are expressed in its preamble. The bill was demurred to on a number of grounds, assigned in the demurrer, going to its want of equity; and from the decree of the chancellor sustaining the demurrer the present appeal is prosecuted.

The bill as filed against the administratrix of the deceased contracting party, A. St. C. Tennille, is based upon clause No. 2 of the contract set out. The contract, however, in its entirety, is to be looked to and considered. The contract is treated in argument by counsel on both sides as an option contract. The demurrer takes the point that the contract is wanting in mutuality. As a general rule, this is no objection to an option contract, since an option, until it has been exercised by the party

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claiming it, is unilateral.—6 Pomeroy's Eq. Jur. § 773. In the contract before us the option to purchase is dependent and conditional. In the first clause of the contract it is conditional upon the wish or desire of the other party to sell, and until such time the right of option could never arise. The second clause of the contract, and upon which the complainant predicates his bill and asks specific performance, is equally indefinite as to when the right of option would arise—not upon the death of the party to the contract, as counsel for appellant seem to think, but at some indefinite time, “before offering the same to any one else or placing the same upon the market.” “A contract that is incomplete, uncertain, or indefinite in its material terms will not be specifically enforced in equity. Following the general rules of equity, there is required a greater degree of certainty and definiteness for specific performance than to obtain damage at law. For specific performance is required that degree of certainty and definiteness which leaves in the mind of the chancellor or court no reasonable doubt as to what the parties intended, and no reasonable doubt of the specific thing equity is to compel done.”—6 Pom. Eq. Jur. § 764.

There can be no question that the contract here sought to be enforced is indefinite and uncertain as to the time when the right of option to purchase would arise. Moreover, if it was capable of being rendered certain and definite as to time, there is no attempt to do so by any averment in the bill, as to an offer by the respondent to sell the stock, or of any intention on her part to sell the same. This is sufficient to defeat the equity of the present bill, without considering the other question of incompleteness of the contract in a failure to fix a price of the stock, or the means of determining its value, whenever the option to purchase might arise. Both questions

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are raised by the demurrer, but we refrain from a discussion of the latter one, as the necessities of the case do not require it; the one discussed being, in our opinion, fatal to any right to a specific performance of the contract.

It follows that the decree of the chancellor sustaining the demurrer must be affirmed.

Affirmed.

SIMPSON, DENSON, and MAYFIELD, JJ., concur.

Chandler, Trustee, v. Traub, et al.

Bill to Require the Payment of the Surrender Value of Certain Life Insurance Policies to Trustee in Bankruptcy.

(Decided April 15, 1909. 49 South. 241.)

1. *Insurance; Contract; Parties; Contract.*—The word, assured, as used in an insurance contract, generally speaking, is synonymous with the word, insured, although sometimes applied to the beneficiary; but where a third party secures a policy on another's life such third party is spoken of as the "assured" since the contract is with such party.

2. *Bankruptcy; Exemptions; Effect on Life Insurance Policy.*—Since the Code exempts from all creditors the sum or amount of insurance becoming due and payable to the assured or the beneficiary and since the Bankruptcy Act exempts to the bankrupt such exemptions as are prescribed by the state laws in force at the time of the filing of the petition, the amount of insurance whether of the cash surrender value or of the sum of the policy payable to the bankrupt or his estate is exempt and the trustee in bankruptcy is not entitled to receive either from the bankrupt or from the insurance company.

APPEAL from Birmingham City Court.

Heard before Hon. C. C. NESBITH.

Bill by E. G. Chandler as trustee in bankruptcy of Jacob Traub against said Traub and a certain insur-

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ance company, to require said Traub and insurance company to pay over to the trustee in bankruptcy the cash surrender value of certain policies of life insurance payable to Traub or his estate, and by him transferred to his wife. A demurrer was sustained to the bill and complainant appeals. Affirmed.

M. M. ULLMAN, for appellant. Sec. 2607, Code, 1896, is unconstitutional, notwithstanding the decision of *Rayford v. Paulk*, 45 South. 714. If the statute is construed as giving an exemption to a living person whose life is insured such exemption so created is not cognate to and embraced in the subject of the title. The word, "assured" and "beneficiary" are synonymous.—29 N. Y. Sup. Ct.; 104 N. Y. 143; 198 U. S. 202; 104 Fed. 968; 15 Am. Bankruptcy Rep. 107.

GEORGE HUDDLESTON, for appellee. A conveyance of exempt property is not fraudulent as to creditors or as to one succeeding to their rights.—*Steiner v. Berney*, 130 Ala. 289; *Bank v. Brown*, 128 Ala. 557; *Pollack v. McNeil*, 100 Ala. 203; *Fuller v. Whitlock*, 99 Ala. 411; *Hodges v. Winston*, 95 Ala. 514; *Fellows v. Lewis*, 65 Ala. 344. Life insurance policies having no cash surrender value do not pass to a trustee in bankruptcy, nor is it necessary for the bankrupt to pay the trustee in order to retain the same.—Sec. 70, Bankruptcy Act; *Hiscock v. Mertins*, 205 U. S. 202. The insurance is exempt from the claims of creditors.—Sec. 2607, Code 1896; *Holden v. Stratton*, 198 U. S. 202; *Mitchell v. Allis*, Ala.; *Pace v. Pace*, 19 Fla. 438. Exemption statutes are liberally construed; *Kennedy v. First Nat. Bank*, 107 Ala. 170; *McGuire v. VanPelt*, 55 Ala. 344.

SIMPSON, J.—The bill in this case was filed by the appellant, as trustee in bankruptcy of Jacob Traub,

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against said Traub, his wife, Minnie Traub, and several life insurance companies, and seeks to require said Traub to pay over to complainant the surrender value of certain life insurance policies, originally made payable to said Traub, or his estate, but which it is alleged have been fraudulently changed so as to make them payable to his said wife, and, in default of said payment, the prayer is that said policies shall pass to the complainant, and that said companies be required to pay said surrender value to said complainant. The bill and amended bill were demurred to, and the demurrers sustained.

This court has recently passed upon the validity of section 32 of the act of February 18, 1897 (Acts 1896-97, p. 1393), holding it not to be violative of the Constitution (*Rayford v. Faulk*, 45 South. 714), and has also held that under said act (which was copied into the Code of 1896 as section 2607) policies of insurance therein described are exempt from the claims of creditors of either the insured or the beneficiary.—*Mitchell et al. v. Allis, Adm'r, et al.*, 157 Ala. 304, 47 South. 715; *Heflin, as Adm'r, v. Allen et al., supra*, 48 South. 695. Whether reference is made to the amount due at the death of the insured, or to the amount of the surrender value of the policy, it is still “the sum or amount of insurance becoming due and payable by the terms of the application and policy.” If the creditors can come in and demand that the value of the policy be paid to them, either by the insured or by the company, it would destroy its value as exempt property and render the statute nugatory.

The appellant claims that there is a distinction between the words “insured” and “assured,” and that the “assured” is the beneficiary, while the “insured” is the party whose life is insured. It is true that the word

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"assured" is sometimes applied to the beneficiary; but, generally speaking, the word is synonymous with the word "insured," and is so defined in the dictionaries. As stated by the Superior Court of New York, in a case in which it was held that the "assured" referred to the beneficiary: "The meaning of the term 'assured' is to be derived from the connection."—*Hogle v. Guardian Life Ins. Co.*, 29 N. Y. Super. Ct. (6 Rob.) 567, 569. In another case the New York Court of Appeals held that because a policy of insurance was taken out by the wife and children, and paid for by them, and the party whose life was insured had nothing to do with it, the wife and children were the parties "assured."—*Ferdon v. Canfield*, 104 N. Y. 143, 145, 10 N. E. 146. It was consequently held that the party whose life was insured could not assign the policy.

It will be seen, from this and other cases, that stress is laid upon the question as to who procured the policy to be issued, and that, when a third party procures a policy on another's life, said third party is spoken of as the assured, because the contract is with him; also that the construction depends upon the "collocation of the terms." 1 Words and Phrases, pp. 592. But, however that may be (although we think that, in our statute, the word applies to the person whose life is insured), in this case, according to the statement in the bill, the person who procured the policy, and whose life was insured, was also the beneficiary, as it is stated that it was payable to him or his estate. The gravaman of this complaint is that he had no right to assign the policy to his wife, and, as above shown, he was both the "insured" and the "assured," if there was any difference in the terms, and the policy was exempt under the statute. Consequently it was no wrong to the creditors for him to assign it to his wife.

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The appellant claims, next, that under section 70 of the bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3451), the surrender value of the policy goes to the trustee in bankruptcy. That section provides that, 'when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors; * * * otherwise the policy shall pass to the trustee as assets.' But the first part of said section, in providing the various items of property which are to be turned over to the trustee, makes a special exception of "property which is exempt," and section 6 provides that "this act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the laws in force at the time of the filing of the petition."

It is evident that section 70 refers only to insurance policies which are not exempt by the state laws. As stated by the Circuit Court of Appeals: "This rule of exemption, therefore, pervades the whole act, and is to be read into every other section and provision of the act."—*Steele et al. v. Buel et al.*, 104 Fed. 968, 970, 44 C. C. A. 287. The point is also clearly decided in the case of *Holden v. Stratton*, 198 U. S. 202, 212, 213, 25 Sup. Ct. 656, 49 L. Ed. 1018.

The trustee in bankruptcy is not entitled to receive any part of the proceeds of said policy of insurance, and the decree of the court is affirmed.

Affirmed.

DOWDELL, C. J., and DENSON and MAYFIELD, JJ., concur.

[Duncan v. Guy, et al.]

Duncan v. Guy, et al.*Bill for Sale of Lands for Division.*

(Decided April 22, 1909. 49 South. 229.)

1. *Landlord and Tenant; Title of Landlord; Tenant Estopped to Deny.*—The general rule is that a tenant entering into possession of land under a lease must surrender the possession to the landlord before he can assail or question the title under which he enters; the exception to this rule is that the tenant may show the termination of the landlord's title or that he has acquired the same since the creation of the tenancy, but this exception does not permit the tenant to assert an outstanding title which he may purchase or permit him to attorn to the person having an outstanding title hostile to that of the landlord.

2. *Same; Waiver of Surrender.*—The evidence in this case stated and examined and held not to show a waiver of a surrender of possession by the landlord so as to permit the tenant to set up an outstanding title acquired by him hostile to the landlord.

APPEAL from Tallapoosa Chancery Court.

Heard before Hon. W. W. WHITESIDE.

Bill by B. C. Duncan against Anna Guy and others for a sale of certain lands for division among joint owners. From a decree for respondents, complainant appeals. Affirmed.

The defendant Guy disclaimed any interest in the land sought to be divided, alleging that she transferred her interest to Johnson ten years before the filing of the bill. Respondent Johnson answered, setting up that he was the owner of the life estate in the entire southwest quarter of the land sought to be divided, and that the children of his deceased wife were the owners of the remainder. He alleges, further, that the complainant's possession of the lands described was that of tenant to him, and that he has never delivered the possession back to the respondent, but has continued to hold possession under said rental contract. Under these allegations the issues were

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made up and submitted, and the evidence is sufficiently set out in the opinion.

LACKEY & BRIDGES, for appellant. While it is true that a tenant may not set up title in himself or an outstanding title to defeat a recovery of the possession by his landlord, yet the rule has this qualification that he can do so when he has acquired the landlord's title, since the creation of the tenancy, or when the landlord's title has expired since the creation of the tenancy.—*Hammond et al. v. Blue*, 132 Ala. 337. A waiver is an intentional relinquishment of a known right or such conduct as warrants an inference of such intent, this intention may be shown by conduct as well as by express agreement.—*Freser v. Aetna Life Ins. Co.*, 90 N. W. Rep. 476-481; *Caulfield et al. v. Finnegan*, 114 Ala. 39-48; *Walker v. Wigginton*, 50 Ala. 583; 2 Bouv. Dict. p. 648; *Bowling v. Cook*, 104 Ala. 130. A waiver may be created by facts that are not sufficient to create an estoppel.—*Casimus Bros. v. Ins Co.*, 135 Ala. 256; *Queen Ins. Co. v. Young*, 86 Ala. 424. As between tenants in common, to establish adverse possession, there must be an eviction, denial of the right to enter, or exclusive claim of the right to occupy; and notice thereof must be shown to have been brought home to the cotenants.—*Johns v. Johns*, 93 Ala. 239. One tenant in common cannot purchase the lands jointly owned, at a tax sale, and acquire title thereto in himself as against his cotenants; and the rule applies with equal force to one who is acting as agent for another with respect to the property sold for taxes, and to the wife of such cotenant or agent.—*Johns v. Johns*, 93 Ala. 239; *Bailey's Admr. v. Campbell*, 82 Ala. 342; *Beaman v. Beaman*, 44 So. Rep. 987; *Robinson v. Lewis*, 8 So. Rep. 258-10 L. R. A. 101; *Hamblett v. Harrison*, 31 So. Rep. 580; *Tyler v. Sanborn*, 4 L. R.

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A. 218; *Bothwell et als. v. Dewees, et als.*, 67 U. S. 2 Black 613. A purchase of lands at a tax sale by one tenant in common, enures to the benefit of all the cotenants. It operates merely as a payment of the taxes by the purchaser, although he may take a deed to himself, and he is entitled, upon proper pleadings, to have contribution therefor from his cotenants.—*Donnor v. Quartermas*, 90 Ala. 164; *Johns v. Johns*, 93 Ala. 239; *Fallon v. Chidester*, 26 Am. Rep. 164. The limitation barring actions to recover lands sold for taxes after three years from the date when the purchaser becomes entitled to a deed, does not begin to run until the purchaser takes possession of the land under his purchase.—*Long et al. v. Boast*, Ala. 44 So. Rep. 955; *National Bank of Augusta v. Baker Hill Iron Co.*, 108 Ala. 635.

JAMES W. STROTHER, for appellee. A purchaser of lands who paid the purchase price, whether the sale is oral or by deed or by bond, holds adversely: *Newson v. Snow*, 91 Ala. 641; *Beard v. Ryan*, 78 Ala. 43. A purchaser of land who takes possession having paid the purchase price holds adversely to the vendor, and the vendor is charged with notice thereof.—*Normand v. Eureka Co.*, 98 Ala. 181. Any actions to recover lands sold for taxes must be brought within three years from the time the purchaser became entitled to demand a deed therefor.—Code 1896, Section 4089; *Capehart v. Cuffy*, 130 Ala. 425. A tax deed, though void as a conveyance of title, may answer as color of title and possession under it for the statutory period will ripen into a title.—*Florence Co. v. Warren*, 91 Ala. 533; *Hughs v. Anderson*, 79 Ala. 209; *Alexander v. Savage*, 90 Ala. 385. The evidence in the case fully proves the pleas of the respondents. When defendant's pleas are proven, he is entitled to a decree in his favor.—*Johnson v. Dadeville*, 127 Ala. 244; *Tyson v. Decatur Land Co.*, 121 Ala. 414; *Stein*

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v. McGrath, 128 Ala. 181; *Fletcher's Equity Pleading & Practice*, page 310. The complainant has no right to maintain this bill as to that part of the land described as the West half of the North-East quarter of Section 14, mentioned in the testimony as the "Weaver eighty"; because as to that part of the land he was the tenant of La Fayette Johnson at the time the bill was filed. Under no circumstances when there is no fraud or mistake will the tenant be permitted to deny the title of the landlord at the beginning of the term.—*Davis v. Williams*, 130 Ala. 530; *Davis v. Pou*, 108 Ala. 443; *Robinson & Ledyard v. Holt*, 90 Ala. 115; *Hammond et al. v. Blue*, 132 Ala. 337. A conveyance of land at a time when it is adversely held is void as against such adverse holder and the persons in privity with him.—*Pearson v. King*, 99 Ala. 125; *Davis v. Curry*, 85 Ala. 133; *Parks v. Barnett*, 104 Ala. 438; *Craft v. Thornton*, 125 Ala. 391.

ANDERSON, J.—It is an elementary principle that, when a tenant enters into possession of land under a lease, he must surrender the possession to the landlord before he can assail or question the title under which he enters.—*McAdam on Landlord & Tenant*, 1341; *Davis v. Williams*, 130 Ala. 530, 30 South. 488, 54 L. R. A. 749, 89 Am. St. Rep. 55; *Barlow v. Daham*, 97 Ala. 414, 12 South. 293, 38 Am. St. Rep. 192. There is an exception to the general rule to the extent of permitting the tenant to show the termination of the landlord's title, or that he has acquired same since the creation of the tenancy. *Hammond v. Blue*, 132 Ala. 337, 31 South. 357. "But while his relation of tenant, and possession as such, continues, he cannot avail himself of an outstanding title (which he may purchase) to dispute the title of his landlord, nor can he then effectively attorn to the person having an outstanding title in hostility to that of his landlord. He must first surrender the premises to his

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landlord before assuming an attitude of hostility to the title or claim of title of the latter." The complainant, in the case at bar, was the tenant of the respondent Johnson when he purchased the one-fifth interest of Mrs. Sanford, which was but an outstanding claim or title of a third person, and falls within the influence of the case of *Barlow v. Daham, supra*; and, not having restored the possession, he is estopped from disputing the title of his landlord.

It is insisted by appellant's counsel that the restoration of the possession was, in effect, waived by the landlord, because of the fact that he accepted but four-fifths of the rent, and thereby acquiesced in the claim of complainant to a one-fifth interest in the land. Conceding that a restoration of the possession can be waived, we do not think that a mere failure to collect and demand, each year, all of the rent, operated as a severance of the relation or a restoration of the status in quo. The complainant testified that he retained one-fifth of the rent because of having bought the Sanford interest, but does not set out enough to show that Johnson waived a surrender of the premises or consented to a termination of the tenancy pro tanto as to the one-fifth interest of the land. On the other hand, Johnson testified: "He has never surrendered the possession of the land to me. I never told Dr. Duncan that I was satisfied when he didn't pay me the \$50 rent, and only paid me \$40. I didn't tell him that that was satisfactory." Nor does Duncan testify that Johnson consented to a termination and waived the restoration as to the one-fifth interest. He merely stated: "It was perfectly satisfactory, so far as I know."

The decree of the chancery court is affirmed.

DOWDELL, C. J., and McCLELLAN and SAYRE, JJ., concur.

[York, et al. v. Leverett.]

York, et al. v. Leverett.

Bill to Set Aside a Deed as Fraudulent, and to Enforce a Vendor's Lien.

(Decided Feb. 4, 1909. 48 South, 684.)

1. *Fraudulent Conveyances; Nominal Consideration; What is.*—The court will take judicial notice of the fact that \$2 was merely a nominal consideration for property worth from \$1,500 to \$2,000, when asked to set aside such conveyance as a fraud.

2. *Same.*—A deed may be technically a voluntary instrument, although founded on some consideration; and where a valuable consideration is necessary to support a deed, the bare recital of a nominal pecuniary consideration, does not show a valuable consideration; and hence, where land had been sold for \$960, with the reservation of a vendor's lien and the purchasers subsequently, when insolvent, and without having paid the vendor's notes, conveys the land to another on the recited consideration of \$2 for the purpose of hindering, delaying or defrauding creditors, and defeating the lien of the note, his vendee will be held a mere volunteer and the deed ineffectual so far as the rights of the prior creditors of the original purchaser are concerned.

APPEAL from Clay County Court.

Heard before Hon. W. J. PEARCE.

Bill by J. M. Leverett against E. York and others to have a deed declared void and to have a purchase-money lien declared upon the property conveyed. From a judgment overruling demurrers to the bill, respondents appeal. Affirmed.

The material allegations of the bill are sufficiently stated in the opinion. The bill was filed in the Clay county court, and addressed to Hon. W. J. Pearce, Judge of said court. Clay county forms a part of the North-eastern chancery division, of which Hon. W. W. White-side is chancellor. The demurrers filed to the bill are as follows: "(1) It appears from said bill that it was improperly filed in this court. (2) For that it appears from said bill that it should have been filed in the county

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court of Clay county. (3) For that it appears from said bill that it is not addressed to Hon. W. W. Whiteside, chancellor of the Northeastern chancery division. (4) For that no facts are alleged in said bill showing that said Sam Wallace executed the deed described in the fourth paragraph of said bill with any intent to hinder, delay, or defraud his creditors. (5) For that it does not appear from said bill that the grantee in said deed had any knowledge of said intent on the part of Wallace, if he had the same, or that said deed was accepted by grantee with any knowledge of the grantor's purpose, or any intent on the part of the grantee, that said deed should defraud any one."

BLACKWELL & AGEE, for appellant. The mere suspicion of the existence of fraud is not sufficient.—*Smith v. Collins*, 94 Ala. 394. The deed recites a valuable consideration and shifts the burden to the appellee to show fraud, and it must, therefore, be specially averred.—*Howell v. Carden*, 99 Ala. 100. The purchaser from an alleged fraudulent vendor is charged with the burden of negating notice or knowledge of the financial condition or intent of his vendor.—*Kellar v. Taylor*, 90 Ala. 289.

WHATLEY & CORNELIUS, for appellee. Whatever is sufficient to put a party on inquiry is sufficient to charge him with notice.—*Manassas v. Dent*, 89 Ala. 565; *Foxworth v. Brown Bros.* 114 Ala. 202; s. c. 120 Ala. 59; *Kyle v. Ward*, 81 Ala. 120; 21 A. & E. Ency of Law, 584; 23 Id. 494. The consideration must be adequate as well as valuable and his conveyance is voluntary in respect to the remainder above the purchase price.—*Fairfield P. Co. v. Kentucky Clothing Co.*, 110 Ala. 536; 2 Brock 211;

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31 Fed. 588; 6 Wall. 290; 14 A. & E. Ency of Law, 292; 23 Ib. 488; 513. Under the deed the purchaser was not an innocent purchaser.—*Burch v. Carter*, 44 Ala. 117; *Smith v. Perry*, 56 Ala. 269; *Smith v. Burk*, 21 Ala. 136.

DENSON, J.—On the 2d day of October, 1901, H. W. Armstrong, for the agreed price of \$960, sold and conveyed to Sam Wallace the lands upon which it is sought by this bill to have a vendor's lien declared. The price was not paid in cash; but, by agreement between Armstrong and Wallace, Wallace on that day executed three promissory notes, each in the sum of \$320, in which a vendor's lien is reserved, and payable, respectively, to Jno. S. Armstrong, Mrs. A. J. McClintock, and Mrs. A. I. Miller, children of H. W. Armstrong. The notes were delivered to the payees, and in due course of trade were transferred to J. M. Leverett, the complainant in this bill. On the 22d day of October, 1903, Sam Wallace, without having paid the notes, conveyed the lands to the respondent E. York on a recited consideration of \$2. The bill avers that at the time the deed to York was executed Wallace was insolvent, and that he made the deed with the intent to hinder, delay, and defraud his creditors, and to defeat the lien of the notes, which were given for the purchase money. It is also shown by the bill that the consideration for the land, as set forth in the deed from Wallace to York, was a grossly inadequate price for the property conveyed, and that the property was reasonably worth \$1,500 or \$2,000.

It seems clear, upon reason and authority that the averments of the bill place the grantee, York, in the attitude of a mere volunteer, so far as the rights of prior creditors of Wallace are concerned. When a court of chancery is called upon to set aside a conveyance upon

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the ground of fraud, it takes judicial notice that such a pecuniary consideration as \$2 is merely nominal, when there is a transfer of so much value as in the conveyance under consideration. As was said in the case of *Kinnebrew's Distributees v. Kinnebrew's Adm'rs*, 35 Ala. 628, 637: "It is to be observed that a deed may be founded on some consideration, and yet still come within the technical definition of a voluntary instrument. * * * It is a necessary inference from the authorities that, when a valuable consideration is necessary to support a deed, the bare recital of a nominal pecuniary consideration will not be regarded as evidencing such valuable consideration. This doctrine is not at war with the principle that the smallest actual consideration of benefit to the promisor is sufficient to support a promise."—*Goodlett v. Hansel*, 66 Ala. 151, 160. It thus appearing upon the face of the bill that complainant's debt was made prior to the execution of the deed attacked, and was a valid outstanding debt against the grantor at the time the conveyance was made, and that the grantee in that conveyance is a mere volunteer, the bill is sufficient in its averments, so far as the objections made to it by the demurrer are concerned, and the chancellor properly overruled the demurrer.—*Klein v. Miller*, 97 Ala. 506, 11 South. 830.

The decree overruling the demurrer is affirmed.
Affirmed.

TYSON, C. J., and SIMPSON and MAYFIELD, JJ., concur.

[Julian, Insurance Commissioner v. Guarantee Life I. Co.]

**Julian, Insurance Commissioner
v. Guarantee Life I. Co.**

*Bill to Restrain Revocation of License to do Business
in This State.*

(Decided April 21, 1909. 49 South. 234.)

1. *Rebate; Insurance; Contracts.*—Rebate is deductions from stipulated premiums allowed in pursuance of antecedent contracts; hence, a life insurance company issuing contracts providing for a special income in consideration of the rendering on request by insured of certain services to the company does not violate the provisions of section 4579, Code 1907; the services which insured obligates himself to perform afford a consideration for the obligation assumed to allow a special income, although it is optional with the company to demand the service.

2. *Insurance Contract; Statute; Class.*—Where a life insurance company issues contracts providing for a special income in consideration of the insured rendering services to the company on request and providing for the creation by the company of a dividend fund for the class holding such policies, etc., does not violate sections 4579, Code 1907, since the word class qualifies policy holder, and means the holders of like contracts.

APPEAL from Montgomery City Court.

Heard before Hon. A. D. SAYRE.

Bill by the Guarantee Life Insurance Company against Frank N. Julian, Insurance Commissioner seeking to permanently restrain and enjoin said commissioner from revoking the license of the company to do business in Alabama. Decree for complainants respondent appeals. Affirmed.

ALEXANDER M. GARBER, Attorney General, and THOMAS W. MARTIN, Assistant Attorney General, for the State. The questions presented for adjudication are, whether the policy attached to the original bill is violative of section 4597 and 7188, Code 1907, and whether if, in violation of it, the Insurance Commissioner may

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revoke the certificate of authority under section 5551, Code 1907. Counsel discuss the features of the policy and the statute and insist that they are violative of the statute to such an extent as to authorize the revocation of the license, and they cite:—*Urwan v. N. W. Nat. Ins. Co.*, 125 Wis. 349; *Citizens L. I. Co. v. Comm. Ins.*, 128 Mich. 85; *State L. I. Co. v. Strong*, 127 Mich. 346.

MASSEY WILSON, for appellee. Counsel discuss the sections of the Code bearing upon the question and insist that the Commissioner was without authority to revoke the license, citing.—26 A. & E. Ency of Law, 661. Counsel insist that the remedy was by quo warranto, and cite.—77 Ia. 648; 34 Am. St. Rep. 573; 87 Am. St. Rep. 449; *Block v. O'Conner*, 129 Ala. 528. Counsel further insist that injunction is the complainant's remedy.—19 Cyc. 1288.

McCLELLAN, J.—The license of the Guarantee Life Insurance Company, incorporated under the laws of the state of Texas, to do business in this state, was attempted to be revoked by the Department of Insurance of Alabama, as is authorized, in defined cases, by Code 1907, § 4551. The official communication notifying the company of the action taken makes the basis of the revocation violation of Code 1907, §§ 4579, 7188. The latter section (7188) merely penalizes the nonobservance of the provisions of section 4579. The object of the bill, filed by the company, is to permanently restrain the Insurance Commissioner from revoking its right to do business in this state. The action of the court, properly invited, resulted in the ruling, in effect, that the company had violated no law of this state, and that the action of the commissioner in the premises was unwarranted.

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A copy of the policy contract which led the Insurance Department to take the action indicated is exhibited with the bill, and the features of the contract assumed to afford the law's violation may be thus summarized: (1) That it provides two limitations on contracts bearing the "special annual income" clause, viz: (a) The issuance of \$10,000,000 of such policies; (b) the issuance of such policies after October 1, 1917, covering a period of 10 years. (2) That it provides a special income, of shares of \$1 each for each \$1,000 of the face value of each policy of the character bearing such clause, and which income shall be ascertained annually, at the end of each calendar year, and be payable to the policy holder, in his proportion, upon the anniversary of his policy, subject to the payment of the premium on such policy. (3) That it provides as a consideration for such special income that the insured shall render services to the company, upon request thereby, such as reporting upon fitness and desirability of agents or applicants therefor, information regarding applicants for insurance and regarding those applying for reinstatement on lapsed policies, and information or knowledge respecting claims against the company that might aid in protecting it from unjust claims. (4) That it provides for the creation and maintenance by the company of a dividend fund for the class holding such policies, the amount thereof being "\$2 from each renewal premium (renewal here seems to mean each annual payment of the premium) paid on each \$1,000 of insurance issued and continued on this plan," and to improve this fund at the average net rate of interest earned by the company upon its loaned assets, not exceeding 6 per cent.; that this fund shall be distributed, at the end of 20 years from the date of issuance of the policies that have persisted for that period, "in proportion to the net amount of in-

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insurance in force on the life of each policy holder in said class"—the mentioned class being those holding policies issued during the same year—or the distributive share mentioned may be employed, at the end of the stated period, in purchasing additional insurance. We think these comprise all of the alleged objectionable features of the appellee's policy contract.

It is proper to note in this connection that we have before us only the bill, its exhibits indicated, and the demurrer, etc., assailing it. If comparison of the policy in question with any others of this or other companies were permissible, that course is impossible here. The only provisions of the cited statute said to be infringed by the policy exhibited with the bill are these: "Nor shall any such company or agent pay or allow, or offer to pay or allow, as inducement to insurance, any rebate of premiums payable on the policy, nor shall any particular policy holder of the same class be allowed any advantage in the dividends or other benefits to accrue thereon, or any valuable consideration or inducement whatever not specified in the policy contract of insurance." It is assumed that the stipulation in the last sentence quoted, with reference to specification in the contract of consideration or inducement, qualifies only that feature of the statute from further notice, thus resolving the question to the two preceding provisions quoted. One of these inhibits a "rebate of premium payable on the policy" in order to induce insurance, and the other forbids discrimination between "policy holders of the same class."

In the first provision the key word to construction is "rebate." In Webster it is defined: "To abate or deduct from." From *State v. Ins. Co.*, 38 La. Ann. 465, 7 Words and Phrases, p. 5986, deduces this definition: "Deductions from stipulated premiums allowed in pursuance

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of antecedent contract." It is also elsewhere defined as a "drawback" and "abatement." Waiving other considerations possible and leading to the same result, it is too apparent for doubt that the share system created bears no relation to a rebate, for the obvious reason that the policy holder must afford, and does, if he secures the share—provided, the consideration for it by particular services to be performed—services of evident value and utility to the safe conduct of the business of the company. It will not do to say that such services afford no consideration for the obligation assumed by the company to allow a special income. The insured and the insurer each obligate themselves in that regard; and we know of no reason, and apprehend there is none, to pronounce such an engagement a subterfuge, an evasion. That a policy holder of the class in question may not, in fact, be called upon to render the services he has bound himself, upon request, to perform, might be an argument of force in determining the financial wisdom of maintaining such a system; but, when the insured has bound himself to perform services of an entirely reasonable and practical nature, and the insurer has contracted with him on the faith of the assurance, though it be at the insurer's option to demand the services, it could be no more than bare assumption to not only strike from the contract the element involved, but to impeach the bona fides of the arrangement, with the result that a violation of the statute against rebates in insurance dealings might be imputed to the insurer, or to its representatives writing the contract. In short, the share proportionately due, upon the conditions defined, to the policy holder of the described class, must be ascribed for its consideration to the services promised by the insured, as the contract provides. Hence such share is not a drawback, an abatement, of the premium, but is a benefit arising from

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the obligation of the insured to perform the services stipulated for.

The other features said to be offensive to the statute, because they work a discrimination, are likewise not well assailed on that account. The key word to construction of this provision of the statute is the word "class." As therein employed it has no reference to the individual characteristics of the policy holder. It refers to that number of persons who hold similar policy contracts. If it were construed to mean those of like individual characteristics, for instance, of age, family history, or state of health at the time of insurance, the result would necessarily be that an insurance company could not vary its policies, but would be bound, under that interpretation of our status, to conform the policy contract to the individual characteristics of the applicants for insurance. Such a regulation would impair the right of contract, without justification under the police or other power of the state to control the exercise of the right of contract. Furthermore, the phrase "of the same class" qualifies the term "policy holder," and hence "class" clearly means the holders of like policy contracts. To read the provision otherwise is to distort its obvious meaning.

Measuring the policy contract, exhibited with the bill, by the stated interpretation of this provision of the statute, there is left no doubt that by the very letter of the policy contract each policy holder insured thereby is accorded equal advantages and is given no unmerited benefit. Consequently the decree appealed from will be affirmed.

Affirmed.

DOWDELL, C. J., and ANDERSON and MAYFIELD, JJ., concur.

[Berger, et al. v. Butler.]

Berger, et al. v. Butler.

Bill to Construe a Trust Deed and to Quiet Title.

(Decided Feb. 4, 1909. 48 South. 685.)

1. *Trusts; Construction; Equity; Jurisdiction.*—The construction of a deed of trust is, both by the common law and by the statute, a proper subject of equity jurisdiction.

2. *Quieting Title; Equity Jurisdiction.*—By the statute a bill to quiet title is a proper subject of cognizance in equity.

3. *Equity; Bill; Multifariousness.*—Where it was necessary to construe a deed of trust in order to quiet title, and such reliefs were necessary to each other their joinder did not render the bill multifarious.

4. *Quieting Title; Bill; Parties.*—All parties interested in the subject matter of a bill to construe a deed of trust and to quiet title are proper parties; and it is immaterial whether they are complainants or respondents, so long as the court acquires jurisdiction of them.

APPEAL from Jefferson Chancery Court.

Heard before Hon. A. H. BENNERS.

Bill by D. B. Butler, as trustee, against L. Berger and others, to construe a deed and quiet title. From a decree overruling demurrers to the bill, respondents appeal. Affirmed.

The bill avers that on the 9th day of April, 1903, Mary Tolliver executed and delivered to plaintiff, as trustee, an instrument in writing purporting to convey to complainant, as trustee for certain beneficiaries named therein all of her property, both real and personal, copy of which is made an exhibit to the bill; that complainant filed said instrument for record, and said instrument was duly recorded. Then follows an allegation that Mary Tolliver, at the time of the execution of said instrument, owned in her own right and was in possession of certain lots and parcels of land set out in the bill. It is then alleged that after the execution of said instru-

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ment the complainant took possession of said property as trustee under said instrument, and that he has continuously remanded in possession of the same up to the filing of this bill, and that he has continuously remained in possession of the same as such trustee, and is now in possession of the same, and that none of the same has ever been sold or disposed of by the complainant. It is then averred that Mary Tolliver died on the ——day of February, 1908. It is then averred that since the execution of said instrument, and both prior to and since the death of Mary Tolliver, he has received and collected the rent of said property, and that said rent has been applied by complainant to the maintenance and support of said Mary Tolliver, and to the maintenance of said property under the authority and direction of said instrument, and that there is no personal property of said estate, and no personal property has come into his hands. It is then alleged that the beneficiaries named in the instrument are insisting that complainant carry out and administer the trust therein created, to sell said real estate and to distribute the funds as directed by the said instrument; but complainant avers that he is unable to carry out said trust and sell said property as directed by said instrument, for the reason that parties other than complainant and the beneficiaries named claim and assert title and ownership in said property. Then follows an averment of the persons who claim some right, title, or interest in the property; and the persons claiming, the lands claimed, and the title by which they are claimed is set out, and it is asserted that the deed executed by Mary Tolliver to complainant, which is made an exhibit to the bill, was not a deed, but only a power of attorney, revocable at the pleasure of the said Mary Tolliver, and the said instrument conveyed no title to said property, and that the same was revoked and annulled by the said

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Mary Tolliver by the execution by her of said instruments purporting to convey such property to certain respondents, naming them. It is then averred that if the deed to complainant as trustee is a deed, and conveyed title to all of the above-described property, then the subsequent instruments executed by Mary Tolliver and purporting to convey title to the various respondents to the various parcels of land named are null and void, and pass no title to respondents, or either of them, and that said conveyances under which said respondents claim title are a cloud on complainant's trustee, and that by reason thereof complainant is unable to sell said property and administer said estate. The prayer is that the court will decree and adjudge the nature and legal effect of the instrument executed by Mary Tolliver to complainant as trustee on April 9, 1903, and if it be determined that it be a deed, and conveys the property therein described to complainant as trustee, then that the court will direct said respondents to set forth and specify separately and severally their title, claim, interest, or incumbrance on said property, and how and by what instruments the same are derived and created, etc., and that such instruments be declared null and void, and a cloud on complainant, and for general relief. The declear relief. The demurrers attack the bill for that it is filed to compel respondents to propound their title to the lands described, and to quiet title thereto between the parties, but it is not averred that complainant claims to own said lands either in his own right or as personal representative or guardian of others; that it is multifarious, in that it seeks to quiet title to various parcels of land claimed by various respondents separately and severally, and because it joins defendants who are not shown

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to have a community of interests in any one material subject-matter.

KENNEDY & BALLARD, and TILLMAN, GRUBB, BRADLEY & MORROW, for appellant. To justify a joinder defendants must have a community of interest in at least some one material subject matter.—16 Cyc. 194. Any bill to remove cloud must allege actual possession and that possession must not be obtained wrongfully.—*Treadwell v. Tolbert*, 32 South. 126; *Turwater v. Going*, 37 South. 330.

R. B. SMYER, for appellee. No brief Came to the Reporter.

MAYFIELD, J.—This is an appeal from the decree of the chancellor overruling demurrers to the bill. The bill was filed by a trustee, praying the court to construe the deed of trust conveying or attempting to convey to him, as trustee, certain real estate, and to quiet title to the lands conveyed therein. The beneficiaries under the trust deed, and those claiming or asserting title to respective parts of the lands conveyed, are all made respondents to the bill. The grounds of demurrer insisted upon are multifariousness, misjoinder of respondents, and failure to allege or assert such title to the lands or possession therein as will support the action under the statute to quit title; and the insistence as to these is very brief and very gentle.

One of the objects of the bill is to construe a deed of trust, which clearly gives equity jurisdiction, at common law and by statute; the other, to quiet title, is clearly of equitable cognizance given by statute in this state. The bill conforms to the law and practice, both at common law and by statute, pertaining to such proceedings in

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the chancery courts. One of the reliefs is clearly incidental and necessary to the other. All parties interested in the subject-matter of a suit in chancery are proper parties, and it is often immaterial whether they appear as complainants or as respondents, so they are before the court. They were all made parties here. The fact that the various claimants to parts of the lands conveyed by the trust deed claimed title to separate and distinct parts and not jointly, does not prevent joining all of them as respondents. They all claimed a part of the lands conveyed by the trust deed, which alone would authorize the joining of them as respondents to this action. The bill practically follows the statute as to the character of title and possession which a complainant must have to maintain a bill to quiet title under the statute.

The demurrers were properly overruled, and the decree must be affirmed.

Affirmed.

TYSON, C. J., and SIMPSON and DENSON, JJ., concur.

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Bill to Enforce Vendor's Lien.

(Decided April 6, 1909, 49 South. 230.)

1. *Vendor and Purchaser; Contract; Fraud; Evidence.*—One seeking to set aside a purchase of land on the ground of fraud of the vendor has the burden of establishing the fraud by clear and convincing proof.

2. *Same.*—Where there was a direct conflict in the evidence as to the fraudulent misrepresentation inducing the purchaser of the real estate, the fraud is not established by that clear and convincing proof essential to relief, although the number of witnesses testifying preponderated in favor of the person asserting the fraud, since his

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evidence was not entirely free from conflict, and there were corroborating circumstances as to each contention.

APPEAL from Mobile Chancery Court.

Heard before Hon. THOMAS H. SMITH.

Bill by Terry S. Kiernan against Gaines Coleman and others to enforce a vendor's lien, to which respondent filed an answer and cross bill setting up fraud and misrepresentation on the part of the vendor. From a decree for complainant, respondents appeal. Affirmed.

JOHN E. MITCHELL, for appellants. The right to rescission or cancellation because of fraudulent misrepresentation must be established by clear and convincing proof. So also upon discovering falsity of the misrepresentation the party must act promptly to avail himself of the right of rescission. The mere fact, however, that appellant waited before suing for nearly two years and a half would not of itself preclude relief if the case was one calling for relief.—*Pratt L. & I. Co. v. McLean*, 103 Ala. 459; *Orendorf v. Tallman*, 90 Ala. 442; *Hancy v. Legg*, 129 Ala. 626. Laches being defensive matter need not be negatived by the bill.—*Pratt L. & I. Co. v. McClain*, *supra*. Where it does not appear in the face of the bill it must be made by plea or answer.—*Scruggs v. Decatur M. & L. Co.*, 86 Ala. 173. The allegation in the cross bill of fraud and misrepresentation were sufficiently averred as specific facts.—*Orendorf v. Tallman*, *supra*; *Baker v. Maxwell*, 99 Ala. 564.

FREDERICK G. BROMBERG, for appellee. The allegation of fraud and misrepresentation comes too late.—*Smith v. Robertson*, 23 Ala. 312; *Howle v. Birmingham L. Co.*, 95 Ala. 389.

DOWDELL, C. J.—The bill is for the enforcement of a vendor's lien on land. The answer admits all of the

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material allegations of the bill as to the execution of the deed by the vendor and the giving of the purchase-money note by the respondents; but in paragraph 8 of the answer fraud and misrepresentations on the part of the complainant are set up as a defense, and this paragraph is made a cross-bill by the respondents, and on the fact therein alleged it is prayed that the purchase-money note and the deed executed by the complainant to respondents be canceled. The case was heard by the chancellor on the bill, answer, cross-bill, and answer thereto, and the proof, and a final decree was rendered in favor of complainant.

The answer to the cross-bill denies the allegations of fraud and misrepresentation, and the burden of establishing the charges by clear and convincing proof was upon the cross-complainants. The question here argued by counsel is chiefly one of fact, based on the evidence; the issue being that of fraud vel non, made by the cross-bill and answer thereto. In *Howle v. North Birmingham Land Co.*, 95 Ala. 389, 11 South. 15, a case similar in principle to the one before us, it was said by this court, speaking through Walker, J.: "The right to the rescission or cancellation of a contract because of fraudulent misrepresentations must be established by clear and convincing proof. A court of equity cannot grant such relief upon a probability, or even upon a mere preponderance of evidence. The representations themselves and that they were falsely and fraudulently made, must be clearly established."

There was a direct conflict in the evidence as to the making of the alleged fraudulent misrepresentations in this case, and, while the preponderance as to number of witnesses was in favor of the cross-complainants, yet their evidence was not entirely free from conflict, and, besides, there were corroborating circumstances on both

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sides. A careful consideration of all of the evidence fails to satisfy us that the cross-complainants have come up to the full measure of the doctrine stated in the *Case of Howle, supra*. We concur in the view expressed in the opinion of the learned chancellor, accompanying the decree rendered by him, and in his conclusions. The decree will be affirmed.

Affirmed.

SIMPSON, DENSON, and MAYFIELD, JJ., concur.

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Bill to Quiet Title.

(Decided April 13, 1909. 49 South. 223.)

1. *Deeds; Validity; Incapacity and Undue Influence.*—Where a deed is made by a parent to a child, whether natural or adopted, the parent is presumed to be the dominant party in the transaction and the burden is on the party assailing the deed to show incapacity or undue influence.

2. *Same; Parties; Capacity.*—In order to avoid a conveyance, incapacity to understand a thing done as distinguished from mere weakness, must be shown.

3. *Same; Evidence.*—The evidence in this case stated and examined and held to show that the party making the deed under which the complainant claims had the requisite legal capacity.

4. *Evidence; Presumption; Sanity.*—The law presumes everyone to be sane until the contrary is shown.

APPEAL from Selma City Court.

Heard before Hon. J. W. MABRY.

Bill by Lewis Johnson against Norman F. Stanfill and others to quiet title. Judgment for complainant and respondents appeal. Affirmed.

H. F. REESE, and PETTUS, JEFFRIES & PETTUS, for appellant. Transactions between persons occupying fiducia-

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ry relations are presumptively invalid, and the burden is upon the person receiving the benefit to prove affirmatively good faith, full knowledge and independent consent without any proof of undue influence.—*Noble v. Moses Bros.*, 81 Ala. 530; *Harraway v. Harraway*, 136 Ala. 501. And this principle is applied with great rigor to gifts.—2 Pom. Eq. Jur. sec. 957. On the question of the soundness of the grantor's mind counsel cite.—*O'Daniel v. Rodiger*, 76 Ala. 428; *Schiefferlin v. Schiefferlin*, 127 Ala. 14; *Whitney v. Twombly*, 126 Mass. 145.

J. C. COMPTON, and MALLORY & MALLORY, for appellee. The law presumes every man to be sane until the contrary is shown, and the burden is on the party alleging it.—*Rawdon v. Rawdon*, 28 Ala. 565; *White v. Farley*, 81 Ala. 563. It is unsoundness and not mere weakness of mind that avoids a contract.—*Stubbs v. Houston*, 33 Ala. 535; *Kramer v. Weinert*, 81 Ala. 416; *Schiefferlin v. Schiefferlin*, 127 Ala. 37; *O'Donnell v. Rodiger*, 76 Ala. 222; *Taylor v. Kelly*, 31 Ala. 962; *Knorr v. Knorr*, 95 Ala. 495; *Powell v. The State*, 25 Ala. 21; *Dominick v. Randolph*, 124 Ala. 564; *Ford v. The State*, 71 Ala. 392. As to the question of evidence of insanity counsel cite.—*Parrish v. The State*, 139 Ala. 42; *Kimbrough's Case*, 100 Ala. 140; *Harrison v. Harrison*, 126 Ala. 326.

SIMPSON, J.—The bill was filed by the appellee to quiet title under the statute. The complainant is the surviving husband of Susan Johnson, who was the adopted daughter of John Stanfill, deceased, John Stanfill had no children. The respondents are collateral heirs at law of said John Stanfill, and the equity of the bill depends upon the validity of a deed made by said John Stanfill in November, 1898, conveying the property in question to said Susan Johnson. The respondents present the ques-

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tion of the validity of said deed by pleas and by answers and cross-bill, claiming that said deed is invalid because of the mental incapacity of said John Stanfill and because of undue influence.

Appellant's' counsel commences his brief with the proposition that transactions between persons occupying fiduciary relations are presumptively invalid, and (without proof of undue influence) the burden is upon the person receiving the benefit to prove affirmatively good faith, full knowledge, independent consent, etc., citing *Harraway v. Harraway*, 136 Ala. 499, 34 South. 836, *Noble v. Moses Bros.*, 81 Ala. 530, 1 South. 217, 60 Am. Rep. 175, and 2 Pomeroy, Eq. Jur. § 957. This principle does not apply where the donor or grantor is the dominant party, and in a transaction between a parent and child the parent is presumed to be the dominant party. So, where a deed is made by a parent to a child, whether natural or adopted, the burden rests upon the party assailing it to prove incapacity or undue influence.—*Sanders v. Gurley*, 153 Ala. 459, 44 South. 1022; *Hutcheson v. Bibb et al.*, 142 Ala. 586, 38 South. 754; *McLeod et al. v. McLeod*, 145 Ala. 369, 273, 40 South. 414, 117 Am. St. Rep. 41.

Aside from the fact that said John Stanfill resided in the house with the donee, Sue Johnson, and her husband, no effort is made to prove that said Sue Johnson had acquired such an influence over and control of said Stanfill as to become the dominant party, so the only contention is as to his mental capacity. The law presumes every one to be sane until the contrary is proved; and it is unsoundness, and incapacity to understand the business transacted, as contradistinguished from mere weakness, which must be proved, in order to avoid a conveyance.—*White v. Farley*, 81 Ala. 563, 8 South. 215; *Rawdon v. Rawdon*, 28 Ala. 565, 567; *Stubbs v. Houston*,

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33 Ala. 555, 567; *In re Carmichael*, 36 Ala. 515, 522; *Kennedy et al. v. Marrast et al.*, 46 Ala. 161, 168; 22 Cyc. 1206; *Schieffelin v. Schieffelin*, 127 Ala. 16, 37, 28 South. 687; *Taylor v. Kelly*, 31 Ala. 59, 72, 68 Am. Dec. 150; *Knox v. Knox*, 95 Ala. 495, 503, 11 South. 125, 36 Am. St. Rep. 235.

A careful examination of the testimony shows that there is a decided conflict therein as to the general condition of the mind of said Stanfill for several years; that is, witnesses who saw him occasionally, or frequently, testify to disconnected speech, to a failure to recognize persons whom he had known, to his being lost in traveling familiar roads, etc., while others testify that none of these indications were noticed until long after the execution of the deed in question. It will be noticed that even the testimony of those who speak of his "crankiness" and other vagaries does not come up to proof of incapacity, while the testimony of those who knew him best is to the contrary. His lifetime friend and adviser, B. F. Ellis, gives a detailed statement of the consultations of Capt. Stanfill with him, showing an exact knowledge of what he wished to do, giving cogent reasons for wishing to convey the property, describing it first by the names of the two places, and afterwards giving the numbers, to be handed to the scrivener. Mr. Ellis is corroborated by the notary who took the acknowledgment, in so far as he was present, and is not contradicted in any material particular by Elijah Ellis, the other attesting witness.

The evidence shows that said Stanfill had the requisite legal capacity to make the deed, and the chancellor's decree is with error.

The decree of the court is affirmed.

DOWDELL, C. J., and DENSON and MAYFIELD, JJ., concur.

[Railroad Commission of Alabama v. Central of Ga. Ry. Co.]

Railroad Commission of Alabama v. Central of Ga. Ry. Co.

Bill to Enforce An Order of the Commission.

(Decided April 20, 1909. 49 South. 237.)

Carriers; Discrimination; Statutes.—Where a carrier made no distinction in rate between compressed and uncompressed cotton, but included in its rate the cost of compression and accorded to both places the same privilege of rebilling and through rating, but declined to compress the uncompressed cotton at a compress plant in the district, and carried the cotton to a distant place and had it compressed at a plant in which it was interested, though the cost of compression was not greater at one plant than at the other, this did not constitute the carrier guilty of discrimination in violation of sections 17 and 32, General Acts 1907, p. 123.

APPEAL from Montgomery City Court.

Heard before Hon. A. D. SAYRE.

Bill by the Railroad Commission of Alabama against the Central of Georgia Railway Company to enforce an order of the commission adjudging the existence of discrimination in a course practised by the carrier and forbidding its continuance. From a decree for despondents complainants appeal. Affirmed.

ALEXANDER M. GARBER, Attorney General, and THOMAS W. MARTIN, Assistant Attorney General, for the State. This case is founded upon section 17, General Acts 1907, p. 123. Said section is not void on account of being in contravention of section 243 of the Constitution of 1901.—*Ga. R. R. Com. v. Smith*, 79 Ga. 694; *Mo. Pac. v. Bd. of Trans.*, 29 Neb. 556. The fact that the statute prohibits such a practice under a penalty, does not prevent a court of equity from enjoining its continuation.—*Hundley v. Harrison*, 123 Ala. 292; *Rouse v. Martin*, 75 Ala. 510. Section 32 of said Act

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confers the powers herein attempted to be exercised. The order of the railroad commission was not an interlocutory order, but more in the nature of a final decree, the meaning and effect of which should be ascertained by reference to the different parts of the order of the railroad commission.—5 Ency P. & P. 1060. The title of the act is sufficiently comprehensive, and in ascertaining the meaning of section 17, the whole statute and all of its parts are to be taken together and the intention and meaning so ascertained should prevail.—25 A. & E. Ency of Law, 616. The legislature has a right to declare a prima facie rule of evidence.—*State v. Thomas*, 144 Ala. 77; *State v. Vann*, 43 South. 357; 41 Am. St. Rep. 278.

STEINER, CRUM & WEIL, for appellee. The section of the act under consideration now section 5540, Code 1907, is a purely criminal statute and does not invest the commission with power to make the order sought to be enforced. The attempt made here is a legislature one, and must fail.—*Cent. of Ga. Ry. Co. v. R. R. Co.*, 161 Fed. 982; 12 Interstate Com. Rep. 375. The attempt is clearly a delegation of legislative power, and is void.—*Schults v. Eberly*, 82 Ala. 242; *Clark, et al. v. Port of Mobile*, 67 Ala. 217; *Harland v. The State*, 130 Ala. 155; *Mitchell v. The State*, 134 Ala. 392; *State v. Great Northern*, 100 Minn. 445; *Field v. Clark*, 143 U. S. 694.

McCLELLAN, J.—This bill is filed by the Railroad Commission of Alabama for the purpose of invoking the aid of equity to enforce an order of the commission adjudging the existence of a certain discrimination in course of practice by the appellee, a common carrier, and forbidding its continuance. The authority for this order is cited as found in the act approved February 23, 1907 (Acts 1907, p. 117). The particular sections relied on are those numbered 17 and 32. The court below deni-

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ed the relief sought; the pleading leading to the result being demurrer to the bill as amended and motion for an injunction pendente lite commanding the observance of the stated order. The record is necessarily voluminous, but the basis for the granting of the order in question by the commission, and on which the aid of the court of equity to enforce it is sought, appears in the averments of paragraph 5 of the bill as amended. The views entertained obviate any necessity to consider now any of the questions with reference to the constitutionality of the whole or parts of the act involved, or to enter upon a full discussion of the meaning and effect thereof.

The gist of the complaint, out of which the commission's order grew, if we may assume to state it as from the averments of the whole bill as they bear upon the complaint, is that the appellee makes no distinction in rate between compressed and uncompressed cotton; that the compression of cotton is a matter of importance to the carrier alone, in that the reduced bulk of the compressed bale economizes space in shipment; that the carrier includes in its rate for the transportation of all cotton, compressed and uncompressed, the cost of compression, and under its practice uncompressed cotton, in the Union Springs district, is compressed at Montgomery, where compression is had, at the expense of the carrier, at the Atlanta Compress Company's plant, in which the carrier has an interest, as well as a contract therewith, to compress for the carrier cotton so delivered to the Atlantic Company; that at Union Springs there is a plant properly equipped and designed to compress cotton; that the carrier, while willing to accord to cotton billed to a more remote destination, but which is stopped in transit and compressed at the Union Springs plant, the same privilege for rebilling and through rating from the point of first shipment to final destination

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as is accorded cotton compressed at the Montgomery plant, yet it declines to pay the charge and expense necessary to compress cotton at the Union Springs plant, as is its practice to do at the Montgomery plant, notwithstanding such charge and expense at the Union Springs plant is not greater than that exacted and paid by the carrier at the Montgomery plant.

Ruling on substantially the case state, the Interstate Commerce Commission, in an opinion by Clements, Commissioner (*Commercial & Industrial Ass'n of Union Springs, Ala. v. Central of Georgia Ry. Co.*, 12 Interst. Com. R. 375, 377), said: "In view of this statement, which may be taken as substantially true, the complaint is narrowed down in substance to the refusal on the part of the defendant (this appellee) to patronize the compress at Union Springs." That the quoted conclusion was then true, and that so it is on the record before us, is too apparent for doubt. The question of differential rates on compressed and uncompressed cotton, in the territory affected, is not a factor in the case. The commission's order itself eliminates that consideration, for a reason therein given. Hence it necessarily follows that the discrimination complained against is wholly predicated upon the practice of the carrier in selecting the plant at which compression of cotton shipped over its lines shall be, at its cost and expense, compressed. As indicated, the compression is a service of no concern to the producer. It simply enables the carrier to put two bales of compressed cotton in a space one uncompressed bale would occupy. The carrier pays the cost and expense of a process resulting in such benefit peculiarly and only to it. Naturally, those concerned with the Union Springs Compress and the people of that community are interested in the patronage of that plant. Any deflection of business of that character therefrom affects

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the enterprise and the business activity of Union Springs. But, natural and certainly righteous as their stated interests are, that alone cannot avail to condemn the described practice of this carrier. Such a practice is in no sense a discrimination or a favoritism violative of the enactments in question. The practice is only an exercise by the carrier of its clear right to economize its shipping facilities at its own expense, just as it has the right to locate its shops wherever it sees fit, or to buy its equipment in any market, and this without violating any law of which we know, and without the breach of any duty to any interest or community.

There is no obligation on the carrier to compress cotton. There is no right in any one to compel it to compress cotton delivered to it for transportation. Its practice in so doing is merely the execution, at its own expense, of the idea that, the smaller the article of this class, the more economically may it be transported. Whether the place at which the compression of the cotton is accomplished is near or remote from the place of original shipment is a matter of no concern to any one save the carrier. That a result of this practice is that cotton is concentrated at Montgomery, rather than at Union Springs or any other place on the line of road, cannot be discriminatory, if the practice itself is not discriminatory and unlawful. Such a natural consequence of the exercise of the right must necessarily be free from wrong if the practice is so free. If the practice in question were held to be a discrimination, it is evident that to each erected compress on this line of railroad the rule of equality must be applied; and the consequence would be that the prime idea in the compression of cotton by carriers would become secondary to a conceived public interest in forbidding other than equal distribution, among all compresses, of the patron-

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age arising from the business. A newly installed compress would call for a readjustment of the proportion these theretofore existing had enjoyed, and territorial limitations established within which the right of patronage by respective compresses would be confined; and these impractical consequences would be founded upon an act in which the public, in whose interest only inhibitions against discriminations are always made, have no tangible interest—an act voluntarily undertaken by the carrier and at its own expense, for the purpose of facilitating its business and economizing the space in its care. The act of compressing cotton, as shown in this record, works no discrimination against Union Springs or the compress thereat, and we therefore affirm the decree below.

Affirmed.

DOWDELL, C. J., and ANDERSON and MAYFIELD, JJ.,
concur.

Roy v. Roy, et al.

*Bill for Removal of the Administration of an Estate
From Probate to Chancery Court, and to Sell
Land for Division.*

(Decided Feb. 4, 1909. 48 South. 793.)

Administration of Estates; Sale of Land for Distribution; Chancery Procedure.—Sections 157, et seq., Code 1896, furnished the only authority to any court to sell the lands of a decedent for the purpose of distribution, and hence, the requirements of these sections must be complied with, where the sale is made by the chancery court, as well as when made by the probate court.

(McClellan, J., dissenting.)

APPEAL from Jefferson Chancery Court.
Heard before Hon. ALFRED H. BENNERS.

[Roy v. Roy, et al.]

Bill by Roy against Roy and others to remove the administration of an estate from the probate to the chancery court, and for a sale of decedent's land for distribution. From a decree ordering a private sale, respondents appeal. Reversed and remanded.

STERLING A. WOOD, and GEORGE A. SMITH, for appellant. The court erred in ordering the sale upon the procedure set forth in the record after the filing of the petition for sale. The procedure required in the probate court should have been followed.—*Bromberg v. Bates*, 112 Ala.; *Sharpe v. Sharpe*, 76 Ala. 312; *Bragg v. Beers*, 71 Ala. 151. The court erred in requiring a bond of the purchaser at the sale.—*Bragg v. Beers*, *supra*; Sec. 759, Code 1896. In the absence of a statutory provision an equity court has no jurisdiction to sell lands for partition among adult owners without their consent.—*Brown v. Hunter*, 121 Ala. 213; *Marshall v. Marshall*, 86 Ala. 387; *Davis, et al. v. Bingham, et al.*, 111 Ala. 295. The right of an administrator to sell lands for distribution is purely statutory.—*Wyatt v. Rambo*, 29 Ala. 526.

HENRY UPSON SIMS, for appellee. There was no error in rendering the decree of sale as the proper procedure was had.—*Avery v. Avery*, 47 Ala. 504. The following cases illustrate to what extent a chancery court is bound by the laws governing probate courts in the sale of real estate.—*Talliferro v. Brown*, 11 Ala. 702; *Hall v. Wilson*, 14 Ala. 295; *Wilson v. Crook*, 17 Ala. 59; *Bragg v. Beers*, 71 Ala. 151; *Sharpe v. Sharpe*, 76 Ala. 312. Nor is it necessary that the testimony in chancery be taken by deposition.—*Holman v. The Bank*, 12 Ala. 408; *Boardman v. Reed*, 6 Peters 328; *Talliferro v. Brown*, *supra*. Chancery has a right to order a sale by private contract.—*Dan Chan. Prac.* (2 Vol.) p. 1472; 3 P. Wms.

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283; 2 Smith's Chan. 233; 1 Sugden B. & P. 64; 1 Bland Chan. 138; 22 S. E. 512. It is the court that sells and the court that confirms.—*Ex parte Branch*, 63 Ala. 383. No error was committed in requiring bonds.—Sec. 759, Code 1896; *Avery v. Avery, supra*; *Bragg v. Beers, supra*.

McCLELLAN, J.—The administration of the estate of James A. Roy, deceased, was properly removed from the probate into the chancery court of Jefferson county upon appropriate bill filed by Louis A. Roy, who was an heir at law of said interstate. Consequent upon this bill the usual processes and practices of the chancery court were employed to bring in parties respondent, resident and nonresident, adult and infant, and a guardian ad litem, consenting in writing to so serve, constituted, to represent the infant parties in interest in the cause. The jurisdiction, therefore, attached for all purposes of administration, unless infirmities to be considered intervened to thwart the effective exercise, in respect of the sale of the real estate for division, of the powers of the court.

Pending the administration, after removal, the administratrix, Cecelia N. Roy, a party respondent, filed her petition therein, praying a private sale of the real estate belonging to the estate for the purpose of division among those entitled thereto, upon the ground that the realty could not be equitably divided. The petition was favorably considered, and a decree entered ordering the private sale as prayed. In the course of the procedure, from the filing of the petition to the decree of (private) sale, the following steps, required in like proceedings in the probate court, conveniently thus enumerated by one of the solicitors in the cause, were not observed: (1) The day for the hearing was not 40 days after filing the petition. (2) There was no publication for non-

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residents. (3) There was no appointment of guardian ad litem for that special proceeding. (4) There was no express denial of the averments of the petition. (5) Testimony was not taken by deposition. (6) The sale was authorized to be privately made, though subject to confirmation by the court.

The errors assigned propound these questions for decision: First. Is the chancery court, in administering an estate of which it has jurisdiction, bound, in order to effect a valid sale, for division, of real estate thereof, to observe the statutory requirements provided for such sales in the probate court? Second. May the chancery court validly order a private sale of real estate, subject to confirmation thereby? Third. Is the decree erroneous in requiring, as a condition precedent to the execution thereof, a bond as provided by Code 1896, § 759?

The majority of the court hold that, as the only authority for any court ordering the sale of a decedent's lands, for distribution, is found in section 157 et seq., of the Code of 1896, it necessarily follows that the requirements of those sections must be complied with, in the chancery as well as in the probate court. The day for the hearing should have been appointed, as required by statute. Publication should have been made as to nonresidents. There should have been a guardian ad litem for this proceeding, and the sale should have been in accordance with the statute. The importance of the questions presented afforded my reason for a statement of my views in dissent from the majority.

The first inquiry is more a matter of interpretation of our previous decisions bearing thereupon than the ascertainment and announcement of substantive law in the premises. For this reason, as well as because best promotive of the effort to declare a sound conclusion, I quote several of these adjudications, from the pens of our learned elders.

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Bragg v. Beers, 71 Ala. 151: "It is true that a court of equity, in the absence of statute conferring the jurisdiction, will not decree a sale of lands of an adult, to make partition, without his consent. * * * Before the jurisdiction of the court of probate to settle an administration, and to make division and distribution, has been put in exercise, without the assignment of any special cause, devisees or heirs, legatees or distributees, may resort to a court of equity for a settlement of the administration. * * * The court (equity), proceeding according to its own practices, is governed by and applies the law controlling the settlement of administrations, the distribution of assets, or the partition or division of property, which prevails in the court of probate. The parties lose neither right nor remedy by resorting to a court of equity, instead of invoking the jurisdiction of the probate court. If, to effect a final settlement, distribution, and partition, a sale of lands is necessary, the court will order the sale in all cases in which, under like circumstances, the court of probate would have had jurisdiction to order it."

Sharp v. Sharp, 76 Ala. 312: "When a court of equity takes jurisdiction of the administration of an estate of a decedent, the court takes the estate in its condition at the time of taking jurisdiction, and is governed by the laws regulating and controlling the sale of property, the payment of debts, and settlement of administrations which are applicable to the administration of estates in the probate court. Following its own practice, the court will decree a sale of lands, when necessary, and when, in similar cases, a court of probate would have had jurisdiction to order a sale. * * * The probate court has jurisdiction to order a sale of the lands of an intestate, in only two cases—for the payment of debts and for distribution. * * *"

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Ex parte Lunsford, 117 Ala. 224, 23 South. 529: "And when the court (equity) takes jurisdiction, following its own rules of practice, it is often said that it will apply the law relating to administrations as it prevails in the court of probate. An examination of the cases in which this expression has been employed will show that by it no more was intended than that the court takes jurisdiction of the administration in the plight and condition in which it was in the court of probate, and will exercise whatever of statutory jurisdiction or authority that court could have exercised in drawing the administration to a final settlement." After referring to the two cases above quoted, with others, the opinion dominates the statutory jurisdiction of the probate court in the premises, and its exercise in the equity courts, as incidental to the general jurisdiction of the equity courts over the trust of administrators. In other words, the original jurisdiction of equity to administer estates, not being inclusive of jurisdiction to sell lands for division, is supplemented in jurisdiction to effect such sale by force of statute only. The conferring of that incidental statutory jurisdiction is expressed in Code 1896, § 3187, and its construction, as indicated, by this court, affords the authority by which equity proceeds to a sale for division.

I interpret the cited statute, in the light of previous decisions of this court, to impose on the equity courts, in the exercise of the statutory, incidental power to sell lands for division, pending administration of the estate, none of the conditions to its exercise by the probate courts, other than the substantive prerequisite to effecting such a sale, viz., that the lands cannot be equitably partitioned among those entitled thereto, must exist and be so judicially ascertained. Otherwise stated: That the practices of courts of equity were not supplanted,

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by assimilation or otherwise, by the bestowal on courts of equity of the incidental power to effect such a sale.

The foundation for this conclusion, which exonerates courts of equity from the statutorily prescribed steps to call into play the power of courts of probate to make such sales, is the distinguishing, between the two courts, characteristic, viz., that equity, once assuming jurisdiction of an estate, will proceed to its final and complete settlement, adjudicating all questions and enforcing the rights of all concerned—a power unknown, of course, to courts of probate. The latter court, in sales of real estate for division, is therefore bound to the procedure defined in the statutory system to that end, and cannot exert the power independent of this procedure. The law is necessarily the same, in such matters, in both courts, and the law, as distinguished from the practices of each, is that the sale, passing title, when confirmed, may be effected when the court has judicially ascertained the fact that the real estate cannot be equitably partitioned. The basis stated for the view of the writer is thus aptly announced in *Tygh v. Dolan*, 95 Ala., at page 271, 10 South. at page 838 among others: “And when an administration is removed into the chancery court for any purpose or in any part, it is there in whole and for all purposes. There can be no splitting up of an administration, any more than any other cause of action. It is one proceeding throughout, in a sense, and the court having paramount jurisdiction of it must proceed to a final and complete settlement.” Upon the bill for removal into the chancery court, jurisdiction, entire, was invoked and assumed, not only of the subject-matter—the administration of the estate—but by regular processes the parties were brought into the court. The guardian ad litem was formally so constituted in the entire cause. The sale of lands for division, because they could not

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be equitably partitioned, was within, of course, the purview of the broad jurisdiction of the court to administer the estate-- an element of jurisdiction conferred by statute, it is true, but none the less, if full disposal of the whole cause was to be effected, as, indeed, equity assumes to do, an element of that comprehensive jurisdiction.

The argument that, since the power possessed by courts of equity to sell lands for division is derived solely from statute, and must, therefore, result, in valid exercise, from the employment of all statutory steps thereto, is not applicable, for the reason, stated before, that the procedure for such sales in courts of probate was not imposed upon courts of equity exercising the jurisdiction to effect such sale in course of the administration of an estate. Independent of the pertinent decisions by this court, as the writer interprets them, there never was any occasion to cumber the equity court with the procedure required to be pursued by courts of probate. For instance, if the requirement, in the probate court, that the inability to effect equitable partition must be proven by deposition taken as in chancery cases before the sale for division could be validly had, is applicable to courts of equity, these courts would be denied their prerogative to refer to the register the ascertainment of the essential fact--would be compelled, without reference to the register, to determine the issue upon the proof taken. Nothing would be gained by such a limitation on practices of the equity courts, for the report of the register on issues of fact submitted for ascertainment is always accompanied with a statement of the testimony upon which the conclusion is based. The majority yield this statutory requirement, and yet its command is as imperative as any of the others held to be applicable. Like reason obviates an necessity to require 40 days to lapse between

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the interposition of the application to sell and the hearing thereon. Under equity practices no reference to a register is ever held without notice thereof to parties in interest. This the court's practices demand, not only out of a purpose to afford such parties an opportunity to be present and to be heard in the premises, but also in order that the court, on its own account, may be fully advised as to its duty in the premises. Likewise the denial of the existence of the necessity to sell for division, or of any other material fact in such proceeding, in the chancery court, by the guardian ad litem, is not essential. The obligation to sustain the necessity to sell, rather than that partition be effected, is just as affirmative without such denial as with it. The court itself, or through confirmation of its register's report, must ascertain the existence of the necessity and propriety to so sell the real estate.

Authority to effect the sale in question by private contract was sought and granted. The writer was at first inclined to the view that no such power could be exercised by the court, and this independent of the statute requiring, in sales by the probate court, that such sales be at public outcry. Fuller consideration has led me to the contrary conclusion. The practice of courts of equity to direct such sales by private contract seems to be well established, and so upon the idea that the manner of sale is a matter reposed in the sound discretion of that court. —Dan Ch. Prac. p. 1293, and authorities there noted; *Cox v. Price* (Va.) 22 S. E. 512. The court is the vendor, and its primary object is to obtain for the property, in the interest of those entitled to the proceeds, full value. This may be best accomplished by private contract, through such occasions must needs be rare. But, whether the sale be at public outcry, after due publicity, or by private contract, title thereunder does not pass until

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confirmation thereof by the court and the action of the court in that important particular would not be taken until fair opportunity is given parties in interest to resist if so desired the confirmation upon the ground among others of inadequacy of price, or, it may be, by such showing as would reasonably induce the court to conclude that a better and fairer price would be obtained by a sale at public outcry.

The decree of sale required, as a condition precedent to the sale thereunder, the execution of the bond stipulated in Code 1896, § 759. I think the theory upon which such sales for division rests denies the application of this statute to them. In other words, my opinion is that that statute has reference only to strictly adversary proceedings, by which property is subjected to obligations, aside from mere community of ownership. The theory underlying the sale for division, in preference to partition which cannot be equitably accomplished, is that each joint owner or tenant in common is entitled to have his interest segregated and delivered to him, and to do so the character of the common property is charged into money; but the interest of no one of such owners, save in the cost of the proceeding, which is generally distributed, is diminished or enhanced. No title or right, in the sense of diminution in estate, is affected, favorably or adversely. Under these circumstances it could not have been contemplated that the burden of a bond, conditioned as defined in the statute, should be borne in order to effect the division of the common property desired; and to so apply the statute would necessarily lay the condition of a guaranty, in a sense, upon one seeking a sale, when his co-owners would thereby be deprived of naught save the cost of division by sale, a process resulting presumably to the best interest of all concerned.

[Wilkins v. Hardaway.]

From the conclusions of the majority, as before stated, the decree of sale must be reversed, and the cause remanded.

Reversed and remanded.

TYSON, C. J., and DOWDELL, SIMPSON, ANDERSON, DENSON, and MAYFIELD, JJ., concur. MCCLELLAN, J. dissents.

Wilkins v. Hardaway.

Bill for Specific Performance.

(Decided Feb. 18, 1909. 48 South. 678.)

1. *Specific Performance; Demurrer; Grounds.*—Where the bill does not show that the land for which a conveyance is sought is a part of a larger tract owned by defendant, it is not demurrable on the ground that specific performance would infringe defendant's homestead right, either in the particular tract or in the right of selection from a larger tract, since it will not be assumed from such facts alone that it was a part of defendant's homestead.

2. *Vendor and Purchaser; Options; Certainty; Assignability.*—The option provided for the conveyance of land on the west bank of the river between normal low water line and the crest of a dam or dams of such height and at such locations on the river as the purchaser might desire to erect, as such line would meander along the west bank of the river and the north and south lines of such place; it provided further that the area of the tract referred to should be ascertained before the erection of a dam or dams was begun. The purchaser designated the height of his dam, and pursuant to the provisions of the option, a survey was made and the exact description and area of the tract agreed to be conveyed was ascertained. Held, that the subject matter of the contract was rendered certain to every intent so as to make it assignable.

3. *Specific Performance; Contracts Enforceable; Certainty.*—A contract is not rendered too uncertain to warrant its specific performance by the mere fact that the contract reposed in the purchaser the right to determine the line of the tract by determining the height of the dam to be erected.

4. *Same; Pleading; Demurrer.*—Where the bill averred that pursuant to the contract surveys were made and the exact description and area of the tract agreed to be sold ascertained, the bill was sufficient

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against demurrer, and contains sufficient averment to show that all uncertainty was removed.

(Denson and Sayre, JJ., dissent.)

APPEAL from Chambers Chancery Court.

Heard before Hon. W. W. WHITESIDE.

Bill by B. H. Hardaway against J. C. Wilkins for specific performance of a contract to convey. From a judgment overruling demurrers to the bill, respondent appeals. Affirmed.

The contract referred to is as follows: "This memorandum of agreement, made and entered into this the 1st day of March, 1905, between J. C. Wilkins, of the county of Chambers, and state of Alabama, party of the first part, and S. S. Scott, Jr., in the county of Lee, and state of Alabama, party of the second part, witnesseth: That the party of the first part, for and in consideration of \$1 in hand paid, hereby agrees that at any time within six months of this date, at the option of the said party of the second part, and upon further payment by the said party of the second part to the party of the first of the sum of \$25 per acre, then the party of the first part will execute and deliver to the party of the second part good and sufficient title in fee simple to so much of the land of the said party of the first part as will lie and be between a line at normal low-water line on the west bank of the Tallapoosa river and a line level with the crest of a dam or dams of such height and at such location on said river as the said party of the second party may desire to erect, as the said line would meander along the west bank of said river and the north and south lines of said place; it being understood that the area of the tract referred to will be ascertained before the erection of the dam or dams is begun, and it is further understood that the compensation paid as above shall be full and entire compensation for all right, title, and interest the

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said party of the first part shall have in or to the bed of the river or creek opposite to said land. The land referred to and in contemplation in this option is bounded as follows: North, James Hamm; east, Tallapoosa river; south, by self, and extending down to lower point of shoals above ferry; west, by self—in Chambers county, Ala.” This option was transferred from Scott to Hardaway for a recited consideration, and on September 1, 1905, after the execution of the option, it was extended for six months.

STROTHER, HINES & FULLER, for appellant. Specific performance will not be decreed of an agreement for sale unless the property to be conveyed is fixed with certainty as to locality and description, or in such way that it can be ascertained with certainty.—Waterman’s Specific Perf. sec. 154, and authorities there cited. Lands must be so described as to be susceptible of identification.—*Alba v. Strong*, 94 Ala. 163; *Phillips v. Adams*, 70 Ala. 373; *Jenkins v. Harris*, 66 Ala. 345; *Carter v. Shorter*, 57 Ala. 253. Where an action at law will not lie to recover damages for a breach of a contract, equity will not enforce it.—*Comer v. Bankhead*, 70 Ala. 494; *Kent, et al. v. Green*, 128 Ala. 600. There can be no specific performance of a contract to convey the homestead.—*Lyon v. Harden*, 129 Ala. 643; *Moses v. McClain*, 82 Ala. 370. An option to buy land is not assignable.—*Taylor v. Newton*, 44 South. 583; *Perkins v. Hansel*, 50 Ill. 216; 4 Cyc. 22.

E. M. OLIVER, for appellee. No brief came to the Reporter.

McCLELLAN, J.—Bill for specific performance of contract to convey real estate. The report of the case

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will contain the instrument exhibited with the bill. Paragraph 4 of the bill, as at present important, is as follows: "Orator further avers that in accordance with the provisions of said contract a survey was made, and the area of the tract agreed to be sold was ascertained to be 11.8 acres. * * *" From paragraph 5 of the bill it appears that "the exact description of the lands agreed in said contract to be conveyed, as shown by the survey thereof, is as follows:" And it then proceeds with a minute description of the land, and latterly in the paragraph it is stated "that the lands described in this paragraph are the same lands agreed in said contract * * * to be sold, as ascertained by the survey thereof according to the terms of said contract."

It is necessary to note that the appeal is from a decree overruling a demurrer to the bill, the grounds of which will be stated hereafter; the sufficiency of the agreement under the statute of frauds not being among them. These grounds of the demurrer taking the objection that the specific performance sought would impinge the homestead right, either in the particular tract or in the right of selection thereof from a larger tract, cannot be approved upon the averments of the bill, for the reason that it does not appear therefrom that the 11.8 acres are a part of the homestead of the respondent. It does appear that it is a part of a larger tract owned by respondent; but that may, of course, well be, and yet the 11.8 acreage may not now be, nor ever be selected as a part of the home-stead of respondent. Indeed, he may in fact own, and reside upon, as his homestead, other lands in Chambers county. On this bill we cannot assume the fact necessary to give point to the stated ground of demurrer.—*Moses v. McClain*, 82 Ala. 370, 2 South. 741, and *Lyon v. Hardin*, 129 Ala. 643, 29 South. 777, are not authority here, since in those cases it appeared that homestead rights were, in fact, involved.

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It appears from the contract that the actual erection of the dam was not necessary to the establishment of the crest thereof as a basis for the west line of the tract to be conveyed. That point of government of the west line was, then, to be ascertained merely by the decision as to the height of the dam. The bill, in paragraph 4, alleges the ascertainment of the area according to the provisions of the contract, and warrants the conclusion that the essential condition—the crest of the dam—to the location of the west line was met by the selection of its location and the determination of its height. Indeed, from the averments of the bill, viz., “that in accordance with the provisions of said contract a survey of said lands was made and the area of the tract agreed to be sold was ascertained to be 11.8 acres,” we cannot avoid the conclusion that Scott himself, if his action was essential under the contract, fixed the height of the dam from the crest of which the west line of the tract was to find its basis. If so, the subject-matter of the contract was rendered certain to every intent; and that such a contract is assignable is not to be controverted.—*Kett v. Day*, 14 Pa. 112, 53 Am. Dec. 526; 4 Cyc. p. 20 et seq., and notes; 2 Am. & Eng. Ency. Law (2d Ed.) p. 1044 et seq.

The remaining ground of demurrer is that the contract is too uncertain to be specifically enforced. The argument in support of this ground is predicated upon the fact that the contract reposed in Scott the right to determine the location of the west line of the tract by a determination of the height of the dam, thus, in effect, creating a right of choice or selection in Scott, and not defining such west line in the instrument itself. We are of the opinion that the stated ground of demurrer was properly overruled.

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The bill, for the purposes of the demurrer, as we have indicated before, contains sufficient averments to show that the uncertainty of the west line was rendered certain by the ascertainment of the area agreed to be sold, thus, and necessarily, fixing the basis of such line by a determination of the height to which the dam was desired to be erected.—Fry's Sp. Perf. §329; *Jenkins v. Green*, 27 Beavan, 437.

The demurrer was not well taken in any respect, and the decree overruling it must be affirmed.

Affirmed.

DOWDELL, C. J., and SIMPSON, ANDERSON, and MAYFIELD, JJ., concur. DENSON and SAYRE, JJ., dissent, and are of the opinion that the objections interposed to the bill raised the question of the statute of frauds.

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Bill for Receiver, and to Wind up Corporate Affairs.

(Decided Feb. 11, 1909. 48 South. 870.)

1. *Receivers: Appointment; Grounds.*—A bill seeking to have a receiver appointed to take charge of the property of a legally dissolved corporation which alleges only that a sale or lease of the corporation property was contemplated, and that it was not the best sale or lease that could be made, but does not allege the insolvency of the corporation, the incompetency of the trustee or that any fraud was attempted to be perpetrated upon the corporation, the stockholders or anyone else, states no ground for the appointment of a receiver.

2. *Corporation; Foreign Corporation; Dissolution; Continuance for Purpose of Winding up.*—A corporation of the state of Florida dissolved by a decree of the Florida court under section 2155, Rev. St. of Florida, 1892, has full power to sell or lease its corporate property in Alabama through or by its directors as trustees under said Florida section, in the absence of any law in Alabama, to the contrary.

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3. Corporation; Dissolution; Directors; Authority.—The directors or trustees of a business corporation are the managing agents of the corporation, and have all the authority of the corporation itself in the conduct of its ordinary business including the right to convey its property in the absence of any restriction in its charter or by-laws, or of statutory or constitution inhibition, and statutes fixing the authority of the directors as trustees to wind up the business of the corporation and a decree dissolving the corporation does not deprive the directors of their powers as agents of the corporation, so that a subsequent order of the court is not necessary to authorize them to sell the corporate property.

4. Same; Officers; Compensation; Effect of Dissolution.—Where at the instance of stockholders, a corporation is dissolved and placed in the hands of trustees, the office of president of the corporation was terminated, and the incumbent at the time is not entitled to receive a salary as president in addition to compensation as receiver to which he was appointed subsequent to the dissolution; even if entitled to such compensation, the former president's remedy would be at law and not in equity.

5. Costs; At Law and in Chancery.—The statutes and rules regulating costs at law and in equity are entirely different, since in chancery under the provisions of section 3222, Code 1907, cost may be apportioned at the discretion of the chancellor.

6. Same; In Equity.—The discretion reposed in chancellors to apportion cost is a legal one to be exercised in accordance with general rules and precedents, and the chancellor cannot arbitrarily give or withhold cost at pleasure.

7. Receivers; Nature of Office.—A receiver is not the representative of a corporation or other person whose property he holds; his possession is that of the court, and he is the arm of the court to hold possession of the property and manage it for the benefit of those ultimately entitled to it.

8. Same; Payment of Money; Authority.—A receiver being an officer of the court cannot ordinarily pay out any money in his hands as such receiver without an order of the court, general or special.

9. Same; Compensation; Method of Payment.—A receiver's compensation may be allowed in periodical payments, in gross sum, or in the form of commissions on receipts and disbursements. In the discretion of the court; but if commissions are allowed, they are generally regulated with reference to the amount allowed by statute to personal representatives, etc.

10. Same.—Where a receiver is appointed in a legal manner and in good faith discharges his duties, he should not be denied compensation because the court had no power to appoint him; but should be paid out of the estate for his reasonable services, although the appointing order is subsequently reversed and the bill under which it is made, dismissed.

11. Same; Bonds; Action for Damages.—Persons damaged by the appointment of a receiver have a right of action on the bond required to be given by the complainant before the appointment of a receiver, regardless of who must pay the costs in the suit where the appointment is vacated.

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12. *Same; Recovery of Damages for Wrongful Appointment.*—The amount of damages suffered by the appointment of a receiver cannot be adjudicated in the decree vacating the appointment, nor in any suit in the chancery court.

13. *Same; Unauthorized Payment of Debt; Liability.*—Where neither the justice nor the amount of the debt is disputed, the confirmation by the chancellor of unauthorized payments by a receiver of the debts of the company worked no injury to the parties contesting the receivership, although the chancellor had no right to order a confirmation.

14. *Same; Expenditures; Employment of Counsel.*—Where a receiver employs counsel, the courts will determine the amount to be allowed for such services to the receiver, but where the employment was unauthorized, and the court may not allow a receiver credit for a payment made to counsel for such services, the court may satisfy the receiver's act in passing upon his account, although not allowed in the first instance.

15. *Receivers; Expenses of Administration; Premium on Bond.*—If compensation be allowed the receiver at all, the receiver is properly credited with the premium on the bond, since it is a proper charge for the expense of administration of receivership.

16. *Same; Outlay by Agreement of Parties.*—Where, by agreement of the parties to the suit a stenographer was hired, to be paid out of the trust funds in the hands of a receiver, but subject to whatever taxation of cost should be decreed in the case, such agreement left the matter to the decree of the court and the expense could not be said to be improperly allowed because it could not be taxed as costs.

17. *Appeal and Error; Compensation of Receiver; Discretion.*—The amount to be allowed a receiver as well as the question of whether anything should be allowed, rests within the sound discretion of the court, in the absence of a statute regulating such compensation, and the court's action will not be reviewed on appeal unless the discretion is manifestly abused.

18. *Same.*—The taxation of the costs of compensation for a receiver improperly appointed as well as the costs of the suit necessary upon the administration of the estate while the receivership was pending rests within the sound jurisdiction of the court, subject to review only in case of abuse, or where the chancellor clearly acts arbitrarily, and not in the proper exercise of the authority vested in him by the statute, and decisions of the state.

APPEAL from Mobile Chancery Court.

Heard before Hon. THOMAS H. SMITH.

Bill by John W. Black against the Sullivan Timber Co. et al for the appointment of a receiver, etc. From a decree of dismissal and a decree taxing the costs, both parties appeal. Affirmed on both appeals.

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BLOUNT & BLOUNT, and STEVENS & LYONS, for appellant, and cross appellee. The property was in the lawful custody of the trustees under the Florida statutes.—*Black v. Sullivan T. Co.*, 40 South. 669. The bill was insufficient to justify the appointment of a receiver, or an injunction to prevent the threatened act complained of.—*Bridgeport Dev. Co. v. Trisch*, 110 Ala. 286; *Roman v. Woolfolk*, 98 Ala. 237; *Etowah Min. Co. v. W. V. M. & M. Co.*, 106 Ala. 497; *Warren & Co. v. Pitts*, 114 Ala. 68; *Briarfield I. W. v. Foster*, 54 Ala. 633; *Ft. Payne F. Co. v. Ft. Payne C. & I. Co.*, 96 Ala. 477; *Hughes v. Hatchett*, 55 Ala. 681; *Randle v. Carter*, 62 Ala. 95; *Satterfield v. John*, 53 Ala. 127. Under all the principles of equity Black is estopped from asserting any claim to salary, and if not estopped the dissolution of the corporation terminated the contract of employment without any breach on the part of the employer.—36 S. E. 188; 91 N. Y. 174; 88 Fed. 680. Furthermore the affairs of the complainant were in the hands of the court. The power of the board of trustees to sell and convey the land must be determined by an examination of the Florida statutes, which are contained in sections 2145, 2155 and 2157, of the Florida Code. Their language clearly contemplate a sale of the property by the trustees to pay the debt. There was a departure and this question was properly raised by a motion to dismiss.—*Park v. Lyde*, 90 Ala. 246; *Winston v. Mitchell*, 93 Ala. 554; *Caldwell v. King*, 76 Ala. 149; *Penn v. Spence*, 54 Ala. 35; *Vanderford v. Stovall*, 117 Ala. 344. Notwithstanding the discretion of the chancellor as to taxing of the costs, the judgment taxing costs will be reviewed as there are other substantial questions presented.—*Hunt v. Lewin*, 4 S. & P. 147; *Randolph v. Rosser*, 7 Port. 249; *Alexander v. Alexander*, 5 Ala. 517; *Garner v. Pruitt*, 32 Ala. 294;

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Ex parte Robinson, 72 Ala. 391. Inasmuch as the record fails to reveal any equity demanding a different judgment, the prevailing party is entitled to cost.—11 Cyc. 34; 11 Pick. 448; 5 Pick. 259; 5 Ency P. & P. 186; 70 N. W. 467; *Gray v. Gray*, 15 Ala. 786. The allowance of compensation to the receiver was erroneous.—Florida Statutes, supra; 27 Am. Rep. 743; 1 Tenn. Cahn. 472; 2 Id. 110; 11 Veasey Jr. 363; 15 Id. 583; 1 Pom. Eq. Rem. secs. 150-151; High on Receivers, sec. 795; 79 Pac. 700; 183 Ill. 467; 56 N. E. 169; 72 Ill. App. 395; 23 A. & E. Ency of Law 1106-7; Sec. 801, Code 1896.

L. H. & E. W. FAITH, for appellees, and cross appellants. The court did not err in allowing the receiver credit for the debts of the corporation paid by him.—46 Atl. 660; 91 Ill. App. 265; 23 A. & E. Ency. of Law, pp. 1064-1072, 1106; High on Receivers, sec. 798, 805-6. There was no error in allowing receiver compensation.—75 N. E. 31; 105 U. S. 527; 113 U. S. 116; 69 N. E. 54; 133 U. S. 78; 151 U. S. 333; 23 A. & E. Ency of Law, 1106. The court may, in the exercise of its discretion, direct the costs and the compensation of the receiver to be paid of the funds under the control of the court.—*Beckwith v. Carroll*, 56 Ala. 12; *Bryan v. Bryan*, 28 Ala. 516; *Randolph v. Rosser*, 7 Port. 249; *Kitchell v. Jackson*, 71 Ala. 556; *Faulkner v. Campbell Co.*, 74 Ala. 359; *Allen v. Lewis*, 74 Ala. 379; *Conner v. Armstrong*, 91 Ala. 267; *Thornton v. H. A. & B. R. R. Co.*, 94 Ala. 357; *Wills Valley Co. v. Galloway*, 139 Ala. 267. The equity of a bill is not tested by the denial of the material facts alleged even by sworn answer.—*Werbon v. Kahn*, 93 Ala. 201; *Thorington v. City Council*, 88 Ala. 548; *Zelnicker v. Bingham*, 74 Ala. 598; *Watts v. Eufaula Bank*, 76 Ala. 474. The powers of the trustee were limited by and the

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execution thereof referable to the Florida statutes, section 2157 of which excludes and repels the idea of any power in them to sell the property of the trust estate, and extend the trust beyond three years from the dissolution of the corporation.—*Dudley v. Witter*, 46 Ala. 664; *Price v. Methodist Conference*, 42 Ala. 39. If they have the power it would have taken the united action of all five trustees to execute it.—*Scruggs v. Driver*, 31 Ala. 287; *Tarver v. Haynes*, 55 Ala. 503; *Robinson v. Allison*, 74 Ala. 254; *Werborn v. Austin*, 77 Ala. 384. A court of equity is the only forum wherein the beneficiary can be protected.—*Huckabee v. Billingsley*, 16 Ala. 414; *Mc Brier v. Kanker*, 64 Ala. 50; *Amberson v. Johnson*, 127 Ala. 490. Both the property and the trustees being in this state, the court has jurisdiction.—5 Ala. 523; 8 Ala. 680; 18 Ala. 784; 32 Ala. 314; 7 Paige 239; Thompson on Corporations, sec. 8011. There was no estoppel as to Black.—*Buckley v. Anderson*, 137 Ala. 325. Black was entitled to his salary as president.—*Nelson v. Hubbard*, 96 Ala. 238; *Black v. Sullivan T. Co.*, 40 South. 669; 146 Pa. St. 478; 53 N. W. 291; 30 Pac. 1024; 25 W. Va. 36.

MAYFIELD, J.—The original bill in this case was filed by the appellee and cross-appellant, John W. Black, against the Sullivan Timber Company and other individuals, who were trustees of the Sullivan Timber Company, at that time a dissolved corporation under the laws of Florida. The bill was subsequently amended by adding as respondents certain stockholders of the Sullivan Timber Company. The Sullivan Timber Company, a corporation, was dissolved by a decree rendered by the circuit court of Escambia county, Fla., at the suit of the stockholders, one of whom was the complainant, Black. The original respondents to the bill, in connection with

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the complainant, Black, were directors of the corporation prior to its dissolution, and by virtue of the statutes of Florida and the decree of the circuit court dissolving the corporation the directors became the trustees of the corporation charged with the duty of winding up the affairs, and were proceeding so to do at the time the bill was filed by the complainant, Black, who was appointed a receiver of the corporation by the register of the chancery court of Mobile, in which the bill was filed without notice. From this appointment an appeal was taken under the statute to the chancellor, who vacated and annulled the appointment, and from this decree of the chancellor an appeal was prosecuted by the complainant to this court, which decree was affirmed.—See *Black v. Sullivan Timber Co.*, 147 Ala. 327, 40 South. 667.

At the time of taking the first appeal to this court the chancellor made an order continuing the receiver in the possession of the property of the corporation pending the appeal, which provided that he should merely hold and protect the property. It was nearly a year from the time the appeal was taken until decided by this court. During this time the receiver continued to administer the affairs of the corporation. Soon after the affirmance by this court on the former appeal, the receiver filed his accounts, and a reference was duly ordered to be held. Soon thereafter the complainant, who was the receiver, with leave of the court amended his bill, filing what is called by the counsel for appellants a "substituted bill," which not only detailed the facts stated in the original bill, but also contained additional matter occurring since the bill was filed. This substituted bill sought, among other things, to have the chancery court to take jurisdiction of the affairs of the corporation and administer the same through the five statutory trustees, who were made such by the statutes and the decrees

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of the courts of Florida at the time of the dissolution of the corporation. The receiver had filed an account, showing the receipts and disbursements of nearly \$80,000. A reference was ordered, and held, to pass upon this account, and numerous exceptions were filed by the receiver to the register's report, many of which were sustained by the chancellor. The chancellor, however, restated the account, which constituted a part of the register's report. After this report a reference was ordered for the purpose of ascertaining the compensation to be allowed the receiver. The register reported an amount aggregating nearly \$3,000. To this report exceptions were filed, which were overruled by the chancellor. Subsequent to this time the respondents filed a motion to dismiss the bill as amended for want of equity; and among other grounds was one that the bill was a departure from the original bill, and a demurrer was also interposed upon this ground. Upon the hearing of this motion the chancellor granted the motion and dismissed the bill, but taxed the entire costs of the case against the trust or fund in the hands of the receiver, and directed that the receiver pay over to the trustees of the corporation the funds remaining in his hands after the allowance of his own compensation and the costs of the case. This order was complied with by the receiver's paying over the money to himself as one of the trustees, and executing his receipt, by himself as trustee, to himself as receiver, and depositing the amount in the bank through which the corporation appears to have carried on its business. The respondents then sued out this appeal, and assign various errors as to all the rulings of the register and the chancellor upon the receiver's account adverse to the corporation, or to the respondents, and to the allowance of compensation to the receiver, and to the taxing of costs against the corporation or

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trust fund. The complainant also sued out a cross-appeal, and assigns as error the dismissal of the amended bill and the refusal of the chancellor to allow the complainant, who was the receiver, a credit for salary as president of the corporation, which office he had filled for a long time, and held at the time of the dissolution of the corporation.

It is unnecessary on this appeal to decide whether or not the original bill contained equity, or whether or not it would justify the appointment of a receiver as originally filed, for the reason that it was decided on a former appeal by this court, in a learned and able opinion by Justice Haralson, that the averments and proof under the former bill did not make out a case for the appointment of a receiver. Much stress is laid by counsel for appellants and appellee, in their briefs, upon an expression of Justice Haralson in the former opinion, as follows: "It may be, without more, that the facts stated in the bill would be sufficient on which to appoint a receiver in this case; but the answer under oath denies the material averments of the bill on which this contention rests." It clearly appears that this statement by Justice Haralson was dictum at most. It could not now affect the rights or remedies of any of the parties to this suit on this appeal to determine whether or not the original bill contained equity, or whether it justified the appointment of a receiver, for the reason that the court decided on a former appeal that the receiver was improperly appointed, and the chancellor has decided, and with him we concur, that there was no equity in the amended bill, though the chancellor seems to base his opinion upon the ground that there was a variance in the original. As to this it is not necessary for us to decide. Suffice it to say that the bill as amended was without equity, and properly dismissed. We are unable to see how the

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chancery court, or this court, could better administer the affairs of the corporation through the five trustees than the trustees themselves could administer it, in the absence of a showing of incompetency, insolvency, or fraud on the part of the trustees. There is no allegation in either the original or the amended bill that the corporation is insolvent, or that the trustees are incompetent, or that any fraud was attempted to be perpetrated upon the corporation, the stockholders, or any one else. The most that does appear, either from the allegations or the proof, is that the parties were about to make a sale or a lease of the property, which was not the best sale or the best lease that could be made. That the receiver, who was one of the trustees, and complainant, was a man of large experience in the affairs of corporations, having been president of defendant for a number of years, and being such at the time of its dissolution, and that he was a man of great capacity for work of this kind, and that he could manage and had managed the affairs of the corporation better than they were being managed and would be managed by the five trustees named, or a majority thereof, were matters conceded.

We see no reason why the trustees of the corporation, under the statutes of Florida set out in this case and under the decree of the circuit court of Escambia county, Fla., dissolving the corporation and directing that its affairs be wound up by the trustees, did not have sufficient power to sell or lease the property of the corporation, whether it be land or personal property. If they had no such power under the statutes and under the decree of the circuit court of Escambia county, Fla., it is difficult to see how the chancery court of this state could give them any greater powers of disposition. These trustees were the original directors of the corporation. The statutes of Florida above referred to provided that these

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same officers of the corporation should be the trustees. These statutes provide that the settlement of the affairs of the corporation so dissolved shall be managed as prescribed in cases of voluntary dissolution. This section, among other things, provides that the trustees shall have full power to settle its affairs, collect its outstanding debts, and divide the money and other property among the stockholders. Neither these statutes nor the decree of the court of Florida contemplates that the trustees need the aid of any other court to dispose of the property. There is no distinction made between the real and the personal property of the corporation, and it is difficult to see how they could wind up the affairs of the corporation and divide and distribute the proceeds without a sale. Section 2155 of the Revised Statutes of Florida of 1892, among other things, provides that the corporation dissolved shall be continued as a body corporate for three years after dissolution to enable it to dispose of and convey its property. We do not think that there can be any doubt as to the power and authority of these trustees to dispose of this property, unless there be some laws in Alabama to the contrary. We know of no law in this state to the contrary, nor do we see that such statutes of Florida or the decree of the court based thereon dissolving the corporation contravenes the policy of any laws of this state or of public policy. In this state, at the time of this dissolution, we had kindred statutes, as was decided by Justice Haralson in the former case.— See sections 1291-1301 of the Code of 1896. Our statute authorized a dissolution of the corporation in the chancery court in the same manner that these statutes of Florida authorized a dissolution in the circuit court. There is quite a similarity between the statutes of Florida and those of this state above referred to, and the statutes and the proceedings in the court would be useless

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if they did not authorize the trustees to sell the property for the purpose of winding up the affairs of the corporation.

In business corporations the managing board is usually called the board of directors, though sometimes called trustees, and these directors are the general or managing agents of the corporation; and these directors, in the absence of restrictions in the charter or by-laws, or of statutory or constitutional inhibition, have all the authority of the corporation itself in the conduct of its ordinary business. Hence, without the statute of Florida or without the decree of the court dissolving, these are the parties who would have the right to convey the property of the corporation, and certainly it cannot be said that these statutes or the decree of the court dissolving the corporation had the effect to take from these individuals the power of disposing of the property. It may be said that the capacity in which they dispose of it is changed by the statute and by the decree, and that they must thereafter dispose of it as trustees, instead of as directors.—See Thompson on Corporations, vol. 3, § 3697 et seq. Consequently the claim that there was equity in the amended bill, for the reason that it was necessary to authorize a sale of the property of the corporation, is without merit.

We do not think there is any merit in the claim of the receiver that, in addition to his compensation as receiver, he is entitled in this action (or in any other action, for that matter) to compensation or salary as president of the corporation after dissolution. This claim clearly has no standing in a court of law or equity. In the first place, the corporation was dissolved at the suit of the stockholders, chief among whom was the receiver, and it was there that the corporation was placed in the hands of a board of trustees, of which body he was one. The

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fact of this decree of dissolution certainly terminated the office of president of the corporation. It certainly had the effect to discharge him as president from the performance of the duties of president of the corporation, and to enjoin upon him the performance of other duties as one of the trustees for winding up the affairs of the corporation, instead of the services of president. It would certainly be an anomalous proceeding to allow the complainant to file his bill in the court of Florida, asking a dissolution of the corporation of which he was the president, a stockholder, and a creditor, and its commitment to the hands of a board of trustees (he being one of those trustees), with instructions and directions under the law to wind up the affairs of the corporation, and then continue thereafter to allow him a salary for services which he could not perform; but, if it should be conceded that he was entitled to compensation as president of the corporation, it is not matter for adjudication or allowance in this suit, filed by him as complainant, under which he has acted as receiver of the corporation appointed by the court. If he has any right or remedy, it is in a court of law, and not in this court; and he having filed this bill of complaint in the chancery court of Mobile county, and having had himself appointed receiver, and as such receiver, under the directions of the court, having continued to manage the affairs of the corporation exclusively, and having been allowed compensation therefor, it would certainly be unjust and inequitable, after such exclusive control by him as receiver, to allow him additional compensation as president of the dissolved corporation, which was dissolved at his instance and request. It therefore follows that the cross-appellant has no cause for complaint as to the errors assigned on his cross-appeal.

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It must be conceded that this is an anomalous case in many respects. The bill filed was chiefly for the appointment of a receiver of the dissolved corporation, for the purpose of winding up the affairs of the corporation through the court under the direction of the receiver. By a former decision of this court, and by the decision on this appeal, it conclusively appears that the bill was improperly filed, and that the receiver was improperly appointed, that the receiver was properly discharged, and that the original and amended bills were properly dismissed; and yet it appears that the complainant has not been and should not be taxed with the costs of the proceeding, further than his interest in the trust fund may appear. While the original bill and the amended bill were properly dismissed for want of equity, and the receiver was properly discharged, notwithstanding this, it follows that the learned chancellor in the court below was of the opinion that the trust estate had been benefited by the services of the receiver as such, and that loss or deterioration of the trust estate had been prevented by the filing of the bill, the appointment of the receiver, and by his management of the estate upon the litigation. It is true, as stated by counsel for appellant in their brief, that this was a question which was not litigated, and as to which the decree of the lower court does not adjudicate. Yet it remains that it does have influence in allotting and awarding costs of the litigation, as to the compensation to which the receiver is entitled, and as to making the costs of the proceeding a charge against the funds of the estate, under the statutes and practice regulating proceedings in courts of chancery in this state.

Whatever may be the law of England, or of other states, it is the settled law of this state that the statutes and rulings regulating costs in courts of law and in

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courts of equity are entirely different. In courts of law by statute (section 1325 of the Code of 1896, now section 3662 of the present Code), the successful party in civil actions is entitled to full costs, except in case otherwise directed by law; whereas, in chancery, the rule is entirely different, and made so by statute (section 851 of the Code of 1896, now section 3222 of the present Code), by which it is provided that costs may be apportioned at the discretion of the chancellor. So it follows that, by statute, in courts of law the successful party recovers full costs, as to which the trial court has no discretion, except in cases otherwise provided by law; whereas, in courts of chancery, the costs are apportioned at the discretion of the chancellor. This might be true without the statute referred to, though as to this we do not decide; but it is certainly true with the existing statutes. The statute providing that costs in equity shall be paid by either party, at the discretion of the court, first appeared by an act of the territorial Legislature of Mississippi in 1807. See section 26, p. 350, Clay's Dig. It appeared as section 3007 of the Code of 1852, which is, as codified, in accordance with another previous statute to authorize execution against security for costs. This section has reappeared in all succeeding Codes without any material change. The statute was first construed in the case of *Gray v. Gray*, 15 Ala. 786, as it then appeared in Clay's Digest. Chilton, J., referring to the statute, says: "As to the matter of costs, we have felt some hesitation. The statute declares 'that costs in chancery shall be paid by either party, at the discretion of the court.'—Clay's Dig. p. 350, § 26. This statute but affirms a general principal, which obtained as the law before its passage. But, although the court has a discretion with respect to costs, it is not to be understood that it should give or with-

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hold costs at pleasure, but may, it is said, exercise a legal discretion, in accordance with general rules and former precedents." There were several previous decisions of the court, to wit, the cases of *Hunt v. Lewin*, 4 Stew. & P. 138, and *Randolph v. Rosset*, 7 Port. 249, which announce the same rule, declared in the statute, but without any direct reference to the statute, though the statute was existing at that time.

Stone, J., in the case of *Allen v. Lewis*, 74 Ala. 381, says: "As a general rule costs in equity may be decreed against either party, or may be apportioned in the discretion of the chancellor; and the error in this regard, if there be nothing more in the case, is no ground for the reversal." But, continuing, the learned judge adds: "We have rulings which slightly modify this rule, and hold that, if a substantial question be presented on appeal, the decree may be varied as to costs, although affirmed in every other material point." He further adds: "We need not say whether we approve this doctrine or not, as it does not arise in this case. The rule we have announced is certainly a sound and just one. It enables the chancellor to impose the burden of the litigation where he finds the fault to lie, or to apportion the burden where there has been mutual fault; but, to call this discretion into exercise, the cause either in whole or in part must have been submitted to him for decision and decree. The judicial mind must have acted on some question of merit in the case before there can be a subject or a predicate on which to exercise the discretion."

Somerville, J., in the Case of *Falkner v. Campbell Printing Press Co.*, in concluding the opinion in that case (74 Ala. 364), says: "The taxation of costs was a matter of discretion, and they could be properly taxed and made payable out of any moneys in the custody of the court which belonged to any of the parties litigant

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and subject to the lien of the mortgages sought to be foreclosed." The same justice, in the case of *Mahan v. Smitherman*, 71 Ala. 563, in concluding the opinion of the court, says: "The taxing of the costs was a matter within the wise and just discretion of the chancellor, and is a matter not revisable in the appellate court"—citing section 3900 of the Code of 1876 (1 Brickell's Dig. p. 733, § 1374).

Simpson, J., in the recent case of *Francis v. White*, 142 Ala. 590, 39 South. 174, referring to the authorities above, says, in concluding the opinion: "The matter of the payment of costs rests within the discretion of the court." So it follows, by statute and the unbroken line of decisions of this court for nearly 100 years, that costs in chancery cases may be apportioned at the discretion of the chancellor, or may be decreed against either party, and that an error in this regard, if there be nothing more, is no ground for a reversal, but that if, in addition to this question, there be a substantial question presented for the appeal, the decree of the chancellor in a particular case may be varied as to costs, although affirmed in other material points, though this discretion accorded the chancery court is a legal discretion, in accordance with the general rules and former precedents, and does not authorize the chancery court to arbitrarily give or withhold costs at pleasure.

As to the compensation allowed receivers by courts of equity, by which they have been appointed and discharged, the rule seems to be that, in the absence of a statute regulating the amount of the receiver's compensation, the amount, as well as the prior question of whether or not anything should be allowed, rests within the sound discretion of the chancellor, and that the appellate court will not disturb the action of the chancellor, unless it manifestly appears that this discretion has been

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abused.—*Stuart v. Boulware*, 133 U. S. 78, 10 Sup. Ct. 242, 33 L. Ed. 568; *Hinckley v. Gilman*, 100 U. S. 153, 25 L. Ed. 591. Certain rules have been announced by the various courts of the United States for the direction of the courts in allowing and fixing the compensation of receivers. Some of these rules are to the effect that the court should have regard to the amount of work to be done by the receiver, the kind, character, and extent of services to be rendered, the value, nature, and kind or character of the property intrusted to the receiver's care and management, as well as of the benefits and advantages, accumulation, or losses received from or the result of the efforts, labor, attention, or want of the same, on the part of the receiver.—*Henry v. Henry*, 103 Ala. 582, 15 South. 916.

A receiver derives his authority as receiver from the act of the court appointing him, and not from the act of the parties at whose suggestion or by whose consent he is appointed; and the utmost effect of his appointment is to put the property from that time into his custody as an officer of the court for the benefit of the party ultimately proved to be entitled, and not to change the title to, or even the right of possession in, the property.—*Union Nat. Bank v. Kansas City Bank*, 136 U. S. 223, 10 Sup. Ct. 1013, 34 L. Ed. 341. The receiver is thus said to be a mere arm of the court, to hold possession of the property, take care of it, preserve it, and use it, pending the litigation, and that while it is in his custody as such receiver it is not in his custody as a trustee, but as an officer of the court; that his possession is therefore the possession of the court; that while he continues to hold it as a receiver of the court the property is in custodia legis, and consequently the court will not permit a receiver appointed by its authority, and who is therefore its officer, to be interfered with or dispossessed of

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the property intrusted to his custody as an arm of the court, although the order appointing such receiver may be erroneous. A receiver may be said to represent the court which appointed him, and is sometimes said to be the hand of such court.—*Brown v. Warner*, 78 Tex. 543, 14 S. W. 1032, 11 L. R. A. 394, 26 Am. St. Rep. 67.

Hence, where a receiver is appointed for a corporation, he is not the representative of the corporation, but is the representative of the court which is for the time, at least, administering the affairs of the corporation. A receiver, therefore, cannot appeal from an allowance made by the court in favor of the claimant against funds in his hands. The receiver, as stated above, is a mere arm or hand of the court.—*Lchigh Coal Co. v. Central Railroad Company*, 35 N. J. Eq. 426. It therefore follows as a general proposition that a receiver cannot pay out any money which has come into his hands by virtue of his office, without being authorized thereto by the order of the court, general or special. In all cases he should have, in order to justify the payment, either expressed or implied authority from his creator and ruler, which is the court appointing him.

A receiver should not be allowed compensation for his services in different capacities. If he receives compensation as a receiver, it should be in lieu of compensation in other capacities.—*Battaile v. Fisher*, 36 Miss. 321; *Holcombe v. Holcombe*, 13 N. J. Eq. 417. The compensation may be allowed in the form of periodical payments, of an annual or monthly salary, or of a gross sum, or in the form of a commission on receipts and disbursements. This is left to the sound discretion of the chancellor or court appointing him and allowing compensation; but, if commissions are allowed, they are generally regulated or determined with reference to the amount allowed by

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statute to personal representatives, trustees, guardians, etc.—*Magee v. Cowperthwaite*, 10 Ala. 966.

Compensation should not be denied a receiver because the court had no power to appoint, if he was in fact appointed in a legal manner and has in good faith discharged the duties of such receiver. The court will protect him while acting under the orders of the court, and may award compensation out of the estate or property intrusted to him for his reasonable services, notwithstanding the order of appointment is subsequently reversed and the bill under which he is appointed is dismissed. But it has been held that, if the appointment of a receiver was wholly unauthorized and unwarranted, compensation may be denied. The courts of the various states are at variance upon this question. Justice Tyson, in the case of *Wills Valley Co. v. Galloway*, 139 Ala. 280, 35 South. 850, speaking of this question, says: "But the cases are by no means unanimous on this point—some of the cases holding that the receiver must get his compensation, if at all, out of the fund; others, that the complainants are liable for it." In one line of cases it is held that fees paid by the receiver to his attorney for professional services and other legitimate expenses incurred by him as such receiver are a part of the costs of the administration, and are therefore not admissible as costs in the litigation against the losing party. Another line of cases, cited and referred to by Justice Tyson, is to the effect that courts may reduce the amount of the compensation of the receiver and order a part to be charged against the funds, and another to be adjudged against the losing party; and it was said by the learned justice, now Chief Justice of this court, on page 281 of 139 Ala., and page 850 of 35 South., that these two lines of cases show that all expense incurred by the receiver in the administration of the affairs committed to him, as well as

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his compensation, is not as matter of course taxable as costs against the complainant.

Whether the complainant should be held liable depends, not alone upon the fact that the receiver was improperly appointed, but also upon the character of the demand, and the learned Chief Justice concludes by saying that he wishes to be understood as not intimating which of the two lines of cases should be followed, because they were not then before the court. The question is now, for the first time, before this court as to whether or not the compensation of a receiver improperly appointed, together with the costs of the suit necessary upon the administration of the estate while the receivership is pending, should be paid out of the funds of the estate administered, or whether they should be taxed against the losing party, or whether the whole matter, both as to costs proper and compensation to the receiver, should be left to the sound discretion of the chancellor or court appointing, directing, and discharging the receiver. After a full examination of all the authorities, including text-books, and the decisions of this court and of the courts of other states, and in the light of the aid afforded by the splendid briefs of counsel for the respective parties upon this question, we conclude that it is more just and equitable to leave the whole matter in the sound discretion of the chancellor, subject to be revised by the appellate court only in case of abuse of the discretion, or where the act of the chancellor is clearly arbitrary, and not in the proper exercise of the authority vested in him by the statutes and the decisions of this court. What is said on this subject in the last report of the case of *Wills Valley, etc. Co. v. Galloway*, 47 South. 141, was correct, when applied to the facts of that case; but the facts of this case readily distinguish it from the *Galloway Case*.

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It is strongly insisted by the learned counsel for appellant in this cause, and the argument is not without reason, that as the bill was improperly filed and the receiver improperly appointed, as judicially determined by this court, and the complainant and the receiver is the identical person, the costs incurred in this litigation, including the compensation and expenditures allowed the receiver, are necessarily wrongfully taxed against the trust estate, and that they are losses which should be borne by the parties at whose instance they were incurred. We confess that this argument is very persuasive; but we cannot yield to it without disregarding the express language of the statute, as well as a long line of decisions of this court extending over a period of nearly 100 years.. It may be said that a sufficient answer to this argument is that, before the complainant could have himself appointed receiver under the laws of this state, he was required to execute a bond, conditioned that he would pay all damages which any person might sustain by his appointment as such receiver, should the appointment be vacated. As such appointment has been vacated, the respondents, as well as all other persons, have a remedy by action upon that bond to recover all such damages as they may have sustained. The chancery court is not the proper tribunal, nor is the present action the proper one, in which to determine the amount of damages, if any, which the respondents or others may have sustained by the wrongful appointment of the receiver. So if the respondents have suffered damages by reason of the wrongful or unauthorized act of the complainant in having the receiver appointed, they are not without remedy, whatever may be the decree of the chancery court or of this court in allowing or apportioning the costs in the chancery court. It may be that it would be better for all of these matters to be determined by the same tribu-

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nal and in the same action, yet such is not the law nor the practice in this state. What we have said above, of course, is not intended to control in any action that may be brought in a court of law upon the receiver's bond, but is only intended as an answer to the persuasive arguments of the learned counsel against the decree of the chancellor which is in most things affirmed by this court.

It is contended by counsel for appellant in their brief, that, although the receiver was without authority to pay the debts of the company, yet the chancellor had a right to confirm such demands, and consequently, after such ratification by the chancellor, appellant do not insist upon charging the receiver with the \$34,104.45 which he used in paying the admitted debts of the company. In this we concur with counsel for appellant, and, if it could be said to be error on the part of the chancellor (which we do not hold), it would be error without injury; for it appears that the corporation was solvent, and that neither the justice, nor the amount, of the debts paid by the receiver, was disputed, and consequently it could be of no injury to any party to this suit to have paid these just debts. But it is insisted by counsel for appellant that the compensation allowed the receiver of \$2,980 should not have been taxed against the funds of the corporation, or, if allowed, that it should have been taxed against the complainant. It is also insisted by counsel for appellant that many items entered as elements in fixing this amount of compensation were unjust, and that the compensation was also excessive for this reason. We agree with the chancellor as to all of his findings and rulings, in passing upon the accounts filed by the receiver, upon the register's report thereon, and upon exceptions thereto filed by the appellant. We also agree with him in the finding that the amount allowed the receiver was not excessive, and that it was

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within the sound discretion of the chancellor, and not an abuse of the discretion, nor an arbitrary act upon his part, to make this a charge upon the trust fund then being administered, for the reason that it clearly appears, and is not denied, that the estate to be administered was considerable, that it required capacity, experience, and attention to faithfully and efficiently discharge the trust as receiver, and that the complainant had the capacity and experience in managing the affairs of this corporation, and that he was both vigilant and faithful to preserve the property and to prevent a loss to the beneficiaries of the trust. While we do not decide that as receiver he managed the property to a better advantage than would have been done by the trustees, of whom he was one, we are not prepared to say that there was revisable error, or even injury to the beneficiaries of the trust fund, consequent to his appointment or management as the receiver; nor can we say that it was unjust or inequitable to allow him compensation for his services as such receiver, nor that the amount allowed was excessive, nor that it was improperly charged against the trust fund. The reason assigned by the learned chancellor who seems to have devoted considerable study and learning to this case, is that John W. Black was properly appointed receiver by the register on a showing made before him, that pending the former appeal to this court he was continued as receiver and had charge of the property and funds, and that during this time, and until the property could be turned over under an order of the court discharging the receiver, compensation was allowed him, and that he should be compensated as such receiver out of the funds of the corporation; that he had administered the property to the interest of the corporation, and had preserved and managed it to the interest of the creditors and stockholders; that he had given his time, ability,

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and attention to it, and that it was proper that he should be reasonably compensated therefor.

After reviewing carefully the whole record and all matters of fact and law set forth in briefs of counsel, we are persuaded that the chancellor was correct in fixing the amount of compensation and in allowing it to be charged against the funds of the corporation. For the same reason we do not think that there was error in the chancellor's allowing the receiver compensation to be reimbursed for the amount paid his attorneys. It is not shown that the services of these attorneys were unnecessary, or that the amount was unreasonable. It is the settled law of this state, and other states, that where a receiver employs counsel the court will determine the amount to be allowed for services to the receiver, though it has been held that courts will not allow a receiver payment made to counsel for services when the employment of counsel was not authorized; but the same rule applies to this as applies to the payment of debts by a receiver due from the corporation. If the court did not allow it in the first instance, it ratified the acts of the receiver by allowing it in passing upon the account. This is also true as to the amount of compensation allowed counsel for the receiver, and the allowance of counsel fees in this behalf is an allowance made in form to the receiver and not to the counsel. The receiver is an officer of the court, and is entitled to apply to the court for instructions and advice in respect of counsel.

Neither do we think there was any revisable error in allowing the receiver compensation for the premium paid on his receiver's bond. It was a proper and reasonable charge for the expense of the administration of the receivership, if compensation were allowable at all. We think there was no error in allowing the receiver compensation for the amount paid Hoffman as stenographer.

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This amount was paid by the receiver under an agreement of counsel, and it was agreed that it should be paid out of funds of the company then in his hands as receiver, the same to be subject to whatever taxation of costs may be decreed in said cause. The same having been allowed the receiver by the chancellor, it cannot be said that it was improperly allowed because it could not be taxed as costs. The effect of the agreement was evidently to leave it to the decree of the chancellor, and consequently the decree as to this account cannot be disturbed.

We find no error in any of the allowances made by the chancellor. They all appear reasonable and proper. It therefore follows that this cause must be affirmed on both the direct and the cross-appeal, and the costs of the appeal in each case will be taxed equally against both parties thereto.

Affirmed.

DOWDELL, C. J., and ANDERSON and McCLELLAN, JJ.,
concur.

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Injunction.

(Decided Feb. 9, 1909. 48 South, 675.)

1. *Injunction; Dissolution on Coming in of Answer.*—Where the answer fully denied the equity of the bill seeking the injunction, a temporary injunction issued thereon is properly dissolved.

2. *Same; Subjects; Public Officers; Contract.*—While the illegal acts of public officers may be enjoined, mere acts of mistake in judgment cannot be, and county commissioners having authority to contract for the construction of county buildings cannot be enjoined from the fulfillment of the contract although it was inexpedient and not so good a contract as they or others might have made.

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3. *Counties; Contract; Injunction by Tax Payer.*—As the provision of the contract that no change should be made in the contract except on the order of the commissioner's court was for the benefit of the contracting parties, and not for strangers, a citizen and tax payer cannot enjoin the payment of claims for extra work by a contractor under a contract with the court of county commissioners.

4. *Contracts; Rights of Strangers.*—Where the parties to a contract change it, and substitute a new one resting wholly in parol, neither a stranger nor the court can hold the parties to the first contract, although it be in writing and provide that its terms shall not be changed or varied except in writing.

APPEAL from Walker Chancery Court.

Heard before Hon. A. H. BENNERS.

Bill by T. L. Long, et al., citizens and tax payers of Walker county against the Commissioners Court to enjoin the payment of claims for extra work by a contractor under a contract with the Commissioners Court, and to hold the parties to the original contract. From a decree dissolving the temporary injunction issued, complainants appeal. Affirmed.

A. F. FITE, for appellant. The bill was properly filed by complainants as tax payers.—*R. R. Co. v. Dunn*, 51 Ala. 128; *Hayes v. Ahlrich*, 115 Ala. 248; *Gillespie v. Gibbs*, 41 South. 808. On motion to dissolve the injunction all amendable defects are considered to have been made.—*E. & W. R. R. Co. v. E. T. V. & G. R. R. Co.*, 75 Ala. 274; *L. & N. v. Bessemer*, 108 Ala. 238; *Winter v. City of Montgomery*, 101 Ala. 653. If it appears that a continuance of the injunction will cause less inconvenience and injustice to defendant, than would result to complainant from its dissolution, it should not be dissolved.—*Mortgage Co. v. File*, 97 Ala. 483; *Scholze v. Steiner*, 100 Ala. 149; *Bank v. Lauchheimer*, 102 Ala. 454; *Mabel Min. Co. v. Pearson C. & I. Co.*, 121 Ala. 571.

BANKHEAD & BANKHEAD, for appellee. The commissioner's court had the same power to make any change or

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alternation in the contract or in the work as it progressed that it had to make the original contract. An amendment cannot be used in support of an injunction, and the injunction must stand or fall on the original bill.—10 Ency P. & P. 977. There was no equity in the original bill, nor does the amended bill show equity, as the allegation is upon information and belief.—10 Ency P. & P. 929; see also *Matkin v. Marengo County*, 137 Ala. 163. If there is any abuse of discretion or allowance of excessive claim, it can be corrected.—*Com. Ct. v. Moore*, 53 Ala. 25.

MAYFIELD, J.—This appeal is from a decree dissolving a temporary injunction. The impropriety of this decree is the only error assigned. The bill was filed by the appellants, as residents and taxpayers, against the appellees in their official capacity as county commissioners, to enjoin the allowance and payment of claims for extra work performed by the contractor in the construction of a county courthouse. The answer of the respondents denied fully and particularly every averment of the original and amended bills which could be said to give them equity or to authorize a temporary injunction. We fully agree with and concur in the opinion of the learned chancellor that the injunction should be dissolved.

The original bill was clearly without equity. The amended bill, while it may contain equity, was subject to demurrer; but the sustaining of the demurrer thereto is not assigned as error. The answer having explicitly and fully denied every possible equity of the bill, we think the chancellor properly dissolved the injunction, and, while the chancellor has a large discretion on such hearings, we are not prepared to say it would not have been revisable error to retain this injunction on the show-

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ing which appears from this record. Equity will often interpose, in behalf of taxpayers, to restrain illegal acts of public officers under color and claim of official authority, when such acts tend to impair public rights and those of the taxpayers, or will result in irreparable injury to private citizens. But mere negligence of official routine, not gross or wanton, mere error of judgment, or lack of experience, etc., in the absence of fraud, will not authorize courts of equity to enjoin public officers from doing acts authorized by law, whatever may be the opinion of the court or of the public as to the wisdom of such acts or the mode of doing them. The act sought to be enjoined must be unlawful, or the mode, manner, or extent of its execution must be fraudulent in fact or in law.—1 Spelling Extraord. Relief, 483-508.

The county commissioners have the undoubted right and power to build county courthouses, and to make contracts therefor, and to pass and allow valid claims of the contractor on such account. This is not only their right, but is their duty, which they can be forced to perform, or for a failure so to do they can be made liable. The fact that they make a contract for buildings, such as courts may think inexpedient or improper, or not as good as they or other persons could make, is no ground to enjoin them from so contracting, or from carrying out the contract which they have made, within the line and scope of their powers and duties.—*Matkin v. Marengo Co.*, 137 Ala. 155, 34 South. 171; *Hays v. Ahldrich*, 115 Ala. 239, 22 South. 465. Of course, if they make an official contract for the purpose of defrauding the public and for their individual benefit, under color of official right and as a cloak to hide fraud, and by virtue of such official contract or act attempt to have public funds applied, not for the use and benefit of the public but for

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their own personal benefit, or for that of a third party with whom they contract, then a court of equity would enjoin the execution of such a contract, though it was ostensibly for the public good and within the line of their powers and duties. If there can be said to be any such averments in this bill, they are vague and uncertain, and rest largely upon inference; and they were, so far as it was necessary so to do, fully denied by the answer, and there was certainly not sufficient proof otherwise to justify the injunction.—*Harrison v. Yerby*, 87 Ala. 185, 6 South. 3.

There was certainly nothing in the contention of the original bill that the contract for the building was in writing and provided that there should be no change or alternation in the plans and specifications or contract except upon the written order of the commissioner's court, and that the contractor had filed a claim with the commissioner's court for a large sum which was claimed for extra work, not provided for in the contract, and for which there had been no written contract, and that such extra work was, therefore, illegal and in violation of the written contract. This provision was for the benefit of the parties thereto, and not for that of strangers. If both parties agree thereto, they may subsequently amend the whole contract, or any particular part, or make a new one in substitution therefor. Such new contract may be oral, as well as in writing. If the parties to a contract change it and substitute a new one, a third party or court cannot hold them to the first, though it be in writing and provide that its terms shall not be changed or varied except in writing, and the subsequent contract rest wholly in parol. If this were not true, and the commissioners' court should make a bad contract or the architect make a mistake in the specifications, the contract being in writing and providing that neither

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it nor the specifications should be changed, by writing or otherwise, then there would be no relief from the error, though both the commissioners and contractor be willing and desirous to make correction of the error.

The decree of the chancellor must be affirmed.

Affirmed.

DOWDELL, C. J., and ANDERSON and McCLELLAN, JJ.,
concur.

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Contest of Will.

(Decided Feb. 18, 1909. Rehearing denied April 6, 1909.
49 South. 122.)

1. *Infant; Disabilities; Effect of Marriage.*—The marriage in Alabama of a woman between the ages of eighteen and twenty-one years removes her disability of non-age, and her subsequent removal to another state, where marriage does not have that effect, does not incapacitate her to sue in Alabama. (Section 4499, Code 1907.)

2. *Same; Necessity for Guardian or Next Friend.*—A married woman under the age of eighteen years who has no guardian should sue by next friend. (Section 2476, Code 1907.)

3. *Wills; Action to Set Aside; Parties.*—Heirs of a testator are proper parties to an action to contest and set aside a will, though they take nothing under the will, since if the will be set aside, they become distributees; but the mere fact that all the heirs are not joined as parties complainant in an action to set aside the will does not affect the right of some of the heirs to maintain the bill, and where no relief is prayed against minor children of testator in an action to set aside the will, it is not material to the maintenance of the bill that they are made parties defendant instead of complainants.

4. *Same; Validity; Grounds of Contest.*—A contestant is not confined to any single ground of contest but may allege any or all grounds mentioned in the statute which goes to the invalidity of the instrument.

5. *Same; Consistency of Grounds.*—The allegation that the testator was of unsound mind is not inconsistent with the allegation that the will was procured by undue influence.

6. *Same; Pleading; Demurrer.*—The relief to be awarded is to be determined on the final hearing and cannot properly be raised by demurrer to the bill to set aside the will.

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7. Parties; Objections as to Parties; By Whom Made.—The right of the minor heirs to be made parties complainant instead of respondent in an action to set aside their testator's will, is personal to them and the objection that they should have been made complainants cannot be raised by a co-defendant.

APPEAL from Lee Chancery Court.

Heard before Hon. W. W. WHITESIDE.

Bill by Nettie Kate Bowdoin and another against Sarah Hays and others to set aside and annul the probate of a will and to contest the same. From a judgment for complainant, the defendant Sarah Hays appeals. Affirmed.

HOUSTON & POWELL, and SAMFORD & DUKE, for appellant. The bill is filed under section 4298 and 4299, Code 1896. The 1st, 2nd and 3rd grounds of demurrer should have been sustained.—*Knight v. Coleman*, 117 Ala. 266. The 6th and 7th grounds of demurrer should have been sustained.—*Berney v. Torrey*, 100 Ala. 157. On the same authority the 8th and 9th grounds of demurrer should have been sustained.

R. B. BARNES, for appellee. Nettie Bowdoin could sue in her own name although she was a non-resident.—*Knight v. Coleman*, 117 Ala. 226; Secs. 2527, 2531 and 2532, Code 1896. Only parties improperly joined can take advantage of a misjoinder.—3 Mayf. Dig. 260. The 6th and 7th grounds of demurrer were properly overruled.—Sec. 4287, Code 1896; *Moore v. Heineke*, 119 Ala. 627; *Corpening & Co. v. Worthington*, 99 Ala. 544; *Bowling v. McKenzie*, 89 Ala. 476; *Lyons v. Campbell*, 88 Ala. 462. On the above authorities the other grounds of demurrer were properly overruled.

MAYFIELD, J.—This was a bill filed in the chancery court of Lee county to contest the will of T. T. McCoy.

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made on June 19, 1905, which was probated in the probate court of Lee county on the 11th day of December, 1905. The bill was filed by Nettie Kate Bowdoin, a married woman over the age of 18 years, who at the time of the filing of the bill, resided in the state of Georgia, but who was married in the state of Alabama after she had attained the age of 18 years, and by Rosa J. Bealle, a married woman under the age of 18 years, who sued by her next friend, Albert H. Bealle. The bill was filed against Sarah Hays (who was formerly Sarah McCoy), the wife of the testator, over 21 years of age and residing in Lee county, Ala., and against Millard Frank McCoy, William Tillman McCoy, and Theophilus McCoy, minors, residing with their mother, Sarah McCoy, in Lee county; that is to say, the bill was filed by two of the children of testator against the wife and other children of the testator.

The respondent Sarah McCoy, who subsequently married one Hays (and who will be hereafter referred to as Sarah Hays), demurred to the bill, assigning as grounds, first, that Nettie Kate Bowdoin was a non-resident and under the age of 21 years; second, that the said Nettie Kate Bowdoin could not join as a complainant in her own name; third, that she was not a proper party plaintiff; fourth, that the minor children, Millard Frank, William Tillman, and Theophilus McCoy, were not proper parties respondent, because not beneficiaries under the will; fifth, inconsistency of averments in the bill, in that it is averred that the testator was of unsound mind, and, further, that undue influence was exerted upon the testator to make the will; sixth, insufficiency of averment to show testamentary incapacity, or to show that the will was procured by fraud or undue influence. Respondent also demurred to that part of the prayer of the bill which asked that the estate of the tes-

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tator be divided according to the laws of Alabama, and, further, because both complainants were infants and could not maintain the present bill, either in their own name or by next friend. The case was submitted for decree upon demurrer, and, after its being duly argued and considered by the court, it was the order, judgment, and decree of the court that the demurrers were not well taken, and they were therefore overruled, from which judgment and decree this appeal is taken, with a summons and severance, and separate assignments of error by Sarah Hays alone.

We are unable to find any error in the decree of the chancellor overruling these demurrers. The bill was properly filed by these complainants under our statute, and it was also properly filed against the respondents. Though one of the complainants was under 21 years of age, the bill avers that she was married in the state of Alabama after attaining the age of 18 years. Under our statute this had the effect to remove her disabilities of nonage, and her removal to Georgia thereafter could not have the effect to make her a minor again, so far as the laws of Alabama are concerned. Consequently the bill was properly filed by her in her own proper name. The other complainant was a minor, though a married woman under the age of 18 years, and the bill was therefore properly filed in her behalf by her next friend. Section 2476 of the present Code of 1907 (section 17, Code of 1896) provides that infants not having guardians must sue by next friend, and must be defended by a guardian of the appointment of the court. Under section 2531 of the Code of 1896 (section 4499 of the present Code of 1907) the marriage of a woman over the age of 18, or the attainment by a married woman to the age of 18 years, has the effect to remove the disabilities of minority; and section 2527 of the Code of 1896 (section

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4493 of the present Code of 1907) provides that a married woman must sue alone, as if she were sole, except as to certain actions, of which this is not one. These statutes are remedial in their nature, and should be construed to effect the purpose of the Legislature.—*Knight v. Coleman*, 117 Ala. 266, 22 South. 974.

While no relief is sought by the bill against the minor respondents, and while it is true they take nothing under the will, yet the bill is to set aside the probate of the will and to annul the will, which, if done, would leave the testator intestate and, as a consequence, leave the complainants and respondents sole heirs and distributees of the deceased father and husband respectively. In other words, they are the parties interested in this contest, and for that reason are proper parties; and under sections 4298 and 4299 of the Code of 1896 the complainants clearly had the right to come into a court of chancery for the purpose of contesting the probate of the alleged will, and the mere fact that all of the heirs or distributees did not or could not join as parties complainant does not affect the right of the complainants to maintain the bill under the statute, and the question of the extent and character of their relief is one to be determined by a final decree. All of the children of the testator, but for the will, would have been heirs and distributees of his estate, and if he had died intestate his widow would have been interested in his estate, or if the will, which passed to her all his property, should be set aside, she would be interested. Consequently all of the parties interested are before the court, and they are therefore proper parties.

In a court of chancery, unlike a court of law, if all of the parties interested in the subject-matter are before the court, it is often immaterial whether they are before the court in the capacity of complainants or in that of

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respondents. All remedy and relief to which they may appear entitled can be afforded, whether they appear as complainants or as respondents. The minor children who are made respondents could have been made complainants, as no relief is asked against them. It does not appear that they would be injured by any decree of the court which could be rendered, but, on the contrary, that they might be benefited if the relief prayed should be granted. Yet it is not necessary that they be made complainants, but only that they be made parties. Probably they were not willing to join as complainants, which would not be sufficient to bar or prevent the right of the complainants to file the bill and to make them respondents. They can yet have themselves made complainants if they so desire. Nor can their co-respondent complain or object that they are improperly made parties respondent. This is a defense purely personal to them, to be made for them by their guardian ad litem when appointed by the court.

On the contest of a will, the party contesting is not confined to any single ground of contest, but may allege any ground which goes to the invalidity of the alleged will as a ground of contest. He may allege any or all of the grounds mentioned in the statute.—Section 4287 of the Code of 1896. There is no force in the objection that the bill alleges that the testator was of unsound mind at the time of the alleged execution of the will, and that the execution of the will was procured by undue influence of the beneficiary upon the testator. Either ground of the contest is good, and the two are not necessarily inconsistent. We think the averments of the bill, as to grounds of contest, are sufficiently certain, and that there is no inconsistency or repugnancy between the averments, and that the question as to the relief to be awarded, if any, upon a final determination of the suit, is one to be determined by a final

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decree, and not one properly raised by demurrer to the bill.

Many of the questions by the appellant raised on this appeal were decided by this court in the recent case of *Ellis v. Crawson*, 147 Ala. 294, 41 South. 942, and upon the authority of that case and that of the statutes heretofore referred to, for the reasons set forth in this opinion, the decree of the chancellor must be affirmed.

Affirmed.

DOWDELL, C. J., and SIMPSON and DENSON, JJ., concur.

Chambers v. Morris.

Ejectment.

(Decided Jan. 20, 1909. Rehearing denied Feb. 15, 1909.
48 South. 687.)

1. *Evidence; Hearsay.*—Declarations of a former physician and neighbor of a person that such person is dead are hearsay and not admissible to prove death.

2. *Same; Pedigree Evidence.*—It must appear that the person making the declaration is dead before the declaration of such person as a member of the family is admissible on the theory of pedigree evidence, that another member of the family is dead.

3. *Adverse Possession; Evidence.*—Where there was evidence tending to show that defendant's possession was adverse and other evidence tending to show that it was permissible, it was a circumstance to be considered by the jury in determining whether the land had been held adversely or permissively, to show a declaration by defendant's husband in her presence that they (meaning defendant and husband) had no home.

4. *Ejectment; Evidence; Jury Question.*—Where there is evidence of adverse possession of a tract of land, and also evidence that the uncleared land on the tract had been put to such uses as it was susceptible of in its then state, in the way of fire wood, rail timber, etc., the question of whether there had been possession of it adversely, was a question for the jury, and the court should not have directed a verdict for plaintiff.

APPEAL from Henry Circuit Court.

Heard before Hon. A. A. EVANS.

[Chambers v. Morris.]

Statutory action in the nature of ejectment begun by C. V. Morris against Gifford Wiggins and Sub. Anthony. They suggested Lecy S. Chambers as landlord, and after notice she came in and defended. From a judgment for plaintiff defendant appeals. Reversed and remanded.

P. A. McDANIEL, for appellant. The court erred in excluding the testimony of Varnum. The motion to exclude it came too late.—*Smith v. B'ham Ry. L. & P. Co.*, 41 South. 310. The court improperly permitted the statements alleged to have been made by J. W. Chambers to be admitted.—*Lee v. Thompson*, 99 Ala. 95. His declarations were also inadmissible.—*Lee v. Thompson*, *supra*; *Tillman v. Span*, 68 Ala. 102. Lecy Chambers holding was adverse to all the world.—*Newsom v. Snow*, 91 Ala. 641; *Tillman v. Span*, *supra*. It follows that the Bennett mortgage was void.—*Parks v. Bennett*, 104 Ala. 438; *Propst v. Bush*, 115 Ala. 495; *Craft v. Thornton*, 125 Ala. 391; *Davis v. Curry*, 85 Ala. 133; *Humes v. Barrentine*, 72 Ala. 546. Hence plaintiff acquired no title to the lands in suit.—*Parks v. Bennett*, *supra*; *Mahan v. Smith*, 44 South. 375; *Chambers v. Morris*, 42 South. 549.

OATES & OATES, for appellee. Charges are construed with reference to the evidence.—142 Ala. 195. The evidence does not show an adverse holding.—*Newton v. L. & N. R. R. Co.*, 110 Ala. 474; *Chastang v. Chastang*, 141 Ala. 451. Neither party could take possession without the consent of the dowress.—*Bettis v. McNeider*, 137 Ala. 588. The contract was bad for indefiniteness and uncertainty.—*Chastang v. Chastang*, *supra*. Under the facts as shown by the record the declarations of Chambers was admissible.—*Thomas v. deGraffenreid*, 17 Ala.

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602; *Gillespie v. Burleson*, 28 Ala. 551; *McLemore v. Nuchols*, 37 Ala. 662.

DOWDELL, J.—The witness John W. Chambers, having testified on his direct examination that one Colin S. Varnum, who had been examined as a witness on a former trial of the case, was dead, was then permitted to testify as to what the said Varnum had sworn on the former trial. On the cross-examination of Chambers he was asked by counsel how he knew that Varnum was dead, in answer to which he said: "I went to Varnum's former home in Houston county, Ala., and he was not there. His family was there, and they told me he was dead, and that he died at the time named. I saw his family physician, who told me that he attended him in his last sickness, and that he (Varnum) was dead. His former neighbors told me that Varnum was dead. I did not see him myself after death, and know that he is dead only from what these persons told me." Thereupon the court, on motion of the plaintiff, excluded all of the testimony of the witness Chambers as to what Varnum swore on the former trial. In this there was no error. Evidence of the declarations of the physician and the neighbors as to the death of Varnum were hearsay, and by no rule of evidence admissible; and to render declarations made by a member of the family of the deceased admissible as to such death, on the theory of pedigree evidence, it must appear, also, that the party making the declaration is dead, since, if living, his testimony would be not only obtainable, but the best evidence.—*Elder v. State*, 124 Ala. 69, 27 South. 305; *White v. Strother*, 11 Ala. 720; Jones on Evidence (2d Ed.) § 318.

There was evidence on the part of the defendant tending to show that her possession of the land was adverse, and evidence on the part of the plaintiff tending to show

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that the possession of the defendant was merely permissive. In this state of the case it was competent to prove the statement, made by the defendant's husband in her presence, to the effect that they, meaning himself and his wife (the defendant) had no home. It was a circumstance to be considered by the jury in determining whether the land had been held by the defendant adversely or permissively. The court properly admitted this evidence.

As stated above, there was evidence tending to show an adverse possession, and evidence which also tended to show that the uncleared land on the 80-acre tract, to which the defendant set up adverse possession, was put to such uses as it was susceptible of in its then state, in the way of firewood, rail timber, etc., as would go to show actual possession. The court, therefore, erred in giving the general charge requested to find for the plaintiff as to the uncleared land on said 80-acre tract. The question was one that should have been left to the jury.

For the error indicated, the judgment must be reversed, and the cause remanded.

Reversed and remanded.

TYSON, C. J., and ANDERSON and McCLELLAN, JJ., concur.

Hayes v. Martin, et al.

Ejectment.

(Decided Jan. 12, 1909. Rehearing denied Feb. 16, 1909.
48 South. 681.)

1. *Ejectment; Burden of Proof.*—The burden was on the plaintiff to show such survey, where the deed relied on by plaintiff described the land as bounded on one side by a line to be run by a surveyor so as to embrace ten acres, the surveyor's map, etc., to be recorded as part of the deed.

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2. *Same; Evidence.*—The evidence in this case examined and stated and held sufficient to sustain the judgment rendered.

APPEAL from Birmingham City Court.

Heard before Hon. C. W. FERGUSON.

Ejectment by A. W. Hayes against Annie May Martin and others. From a judgment for defendants plaintiff appeals. Affirmed.

SMITH & SMITH, for appellant. As to the sufficiency of the evidence to identify the lands counsel cite.—*Hayes v. Martin*, 144 Ala.; *Coyne v. Warrior Southern*, 137 Ala. 554; *Guston v. McCord*, 130 Ala. 321; 55 N. J. L. 137; 24 South. 552; 2 Devlin on Deeds, Sec. 1014.

H C. SELHEIMER and CABINISS & BOWIE, for appellees. The burden was on the plaintiff to prove his title or possession.

SIMPSON, J.—This action is ejectment, brought by the appellant against the appellees, to recover the land described in the amended complaint. The case was tried by the court without a jury, and judgment was rendered in favor of the defendants. The appellant's brief states that "the sole question for decision in this case is whether or not the land sued for was sufficiently described in the conveyance, or made certain by parol evidence."

When this case was before this court at a previous term, the question was as to the admissibility of the deed from Ware to Armstrong, which is the starting point of the plaintiff's title in the case now under consideration. It will not be here set out in full, as it may be found in that case. The deed was held to be admissible, on the theory that the western side and the southern boundary are definitely described, and the deed contains sufficient directions for the running of the hypotenuse of the triangle; that direction being: "Thence—that is, from

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the northern limit of the western line—running in a southeasterly direction along and near a ravine on suitable ground for a road (on either side of said ravine), from the said center of said section, in the direction of the Union Passenger Depot in Birmingham, Alabama, to the south boundary line of said last-named forty-acre block, to the point of beginning; but it is agreed that there shall be a survey made of said last-described ten acres of said forty-acre block, and a plat and description furnished by the surveyor who may make the survey, that if more than ten acres are embraced in the said certain ten-acre block, above described and as shown in the above diagram, then so much of the north part thereof be cut off and designated by the surveyor as will leave only ten acres remaining, and the excess over ten acres shall not pass by this conveyance. The surveyor's map and certificate of such survey shall be referred to, recorded, and made a part of this deed."—*Hayes v. Martin*, 144 Ala. 532, 40 South. 204. It will be noticed that, according to the directions in said deed, the said line was not necessarily to be a straight line from point to point, but it was to be run on ground suitable for a road, not necessarily along the ravine, but near it, and that the surveyor's map and certificate were to be "referred to, recorded, and made a part of this deed." The writer of the deed seems to have been careful to provide for a definite description to be incorporated with the deed.

Without discussing the point as to whether any other mode of proof than that provided in the deed was admissible, or as to whether the true intent of the deed was not that a survey was to be made by agreement, and, when made, was to become a part of the deed, so that, until that was done, or a line had been agreed on or established by acquiescence, the boundary line was not made de-

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finite, and the deed was not operative, the burden was at least on the plaintiff to show that a surveyor did, in pursuance of the directions in the deed, make the survey, ascertaining where the ground suitable for a road was, and also ascertaining whether the land thus inclosed contained more than 10 acres, and, if so, ascertaining the northern line to which said 10 acres would extend. This last requisite is important, because, if the line as thus run inclosed more than 10 acres, then that portion of the land taken off to reduce the land conveyed by Ware to 10 acres would be in the apex of the triangle, and it may be that there were still 2 acres, answering to the exception in the deed from Armstrong to McDaniel; but, if the line as run contained exactly 10 acres, then the "two acres off of the north end of the subdivision of ten acres" excepted in said deed would be in the apex, and not in the position described in the complaint.

There is no proof that any survey was made, at the instance of Ware and Armstrong, to establish the boundary line of the land; but one Ray is introduced, who testifies that after Armstrong had conveyed to McDaniel, and while McDaniel was on a trade with Banfill, he made a survey of the land at the instance of McDaniel (Armstrong not being present), and his testimony and diagram, which was made years after the survey, tend to show that there were more than 10 acres in the land laid off. But his diagram shows that there was a parallelogram of 50 acres in Banfill's land, and east of it a triangular piece of 3 acres, conveyed to Ledbetter, and north of this about 2 acres, between the northern line of said 8 acres and the land in the apex reserved by Ware, which might answer to the 2 acres excepted. His testimony is not clear; he frequently saying, "from here to there," etc., without designating on the map just what points are indicated.

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On the part of the defendant, W. E. Martin, the husband of defendant, testified to possession by his wife since 1898 and valuable improvements made; also that a line drawn from the northwest corner of the 40 to the south boundary, so as to include exactly 10 acres, would be on land suitable for a road, but that a line to the east of that would not be on land suitable for a road. Hayes, the plaintiff, testified that when he first bought the land in suit, without ever having seen it, on information from Martin he paid taxes for several years on two acres in the apex of the triangle, thinking that it was his land; but afterwards, on information from Ray, he changed his assessment to the land sued for. Carter, a civil engineer, witness on the part of the defendant, testified that he surveyed the land, and attaches two diagrams made by him; one following the lands suitable for a road (which leaves exactly 10 acres in the triangle), and the other, running straight, crossing ravine three time, and being on land not suitable for a road, which would include about 13 acres. A showing, admitted in evidence, was to the effect that two absent witnesses would testify that "they were present when a survey was made by Jas. A. Ray of the 10-acre tract sold by Jas. M. Ware to J. C. Armstrong," and assisted in the survey; that the hypotenuse of the triangle was run west of the ravine, on land suitable for a road.

It is apparent from the evidence that inferences might be drawn to the effect that by running the line according to the directions of the deed the triangle would contain only the 10 acres, and, if so, the 2 acres reserved would be in the apex, and not in the shape described in the complaint. Giving to the decision of the court the force and effect of a verdict of a jury, we cannot say that the court erred.

The judgment of the court is affirmed.

HARALSON, ANDERSON, and DENSON, JJ., concur.

[Roe v. Doe, ex dem. Rowe.]

Roe v. Doe, *ex dem.* Rowe.

Ejectment.

(Decided Feb. 11, 1909. Rehearing denied April 6, 1909.
48 South. 1033.)

1. *Adverse Possession; Duration of Possession.*—Where one through his own possession and that of his predecessors in possession has held land adversely for fifty-two years, he has title by adverse possession.

2. *Same; Visible and Notorious Possession; Filing Notice.*—One who purchases land and is put in possession under a bona fide contract of purchase, or one whose predecessor had acquired title by adverse possession before the statute became effective, is not required to file the notice provided for by section 1541, Code 1896.

3. *Limitation of Action; Computation of Period; Postponement.*—Where adverse possession began before plaintiff's predecessor secured the title, the running of the statute in favor of the adverse holding during the existence of the last life tenancy, is not postponed by the fact that plaintiff's predecessor willed the property for life to claimant's mother with remainder in fee to adverse claimant, as limitations will not be interrupted by the subsequent disability of a claimant unless made so by statute.

APPEAL from Macon Circuit Court.

Heard before Hon. S. L. BREWER.

Ejectment by John Doe, on the demise of Cordelia Roe, against Richard Roe, with notice to Mary R. Goetchius and Ella Russell. There was judgment for plaintiff, and defendant appeals. Reversed and remanded.

The controversy was over a part of the N. $\frac{1}{2}$ of section 28, township 16, range 5. The defendant disclaimed as to a part of said section which lay on one side a fence row running across the quarter section, and as to the other pleaded not guilty. Plaintiff derived the title from the government through mesne conveyances to one A. B. Fannin, by will of Fannin to Mary R. Reid, and from Mary R. Reid to plaintiff. The will, it seems, created a life estate in the wife of the testator, who died

[Roe v. Doe, ex dem. Rowe.]

four years before the bringing of the suit. Plaintiff was one of the children, and Mary R. Reid was the other living child, and the deed from Reid to Roe was for a half interest. The evidence for the defendant showed that she and her predecessors in title had cultivated and otherwise used the land up to the fence row, and that it had been so used and cultivated by her and her predecessors in title before the death of Mr. Fannin, father of the plaintiff. The other facts sufficiently appear in the opinion of the court.

H. P. MERRITT, for appellant. No brief came to the Reporter.

OSCAR S. LEWIS and TROY, WATTS & LETCHER, for appellee. No brief came to the Reporter.

ANDERSON, J.—The defendant did not question the plaintiff's paper title to the north half of the section, or that the strip of land in controversy was in said north half, but relied solely upon actual adverse possession of said strip in herself and those under whom she holds for over 50 years. The plaintiff testified that her father was in the possession of the place; but she knew nothing about the location of the fence, and did not show a possession of the strip south of the fence. On the other hand, her witness Wesley Johnson testified that her possession was only to the fence, and that the defendant's hands cultivated the strip in question. The defendant proved by many witnesses that Col. Chappell maintained the fence 52 years ago, and was in possession of said land and claiming up to the fence; that Russell went into possession under Chappell, and claimed and cultivated up to the fence; and that the defendant has done the same ever since the land was purchased from Rus-

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sell. The defendant, therefore, acquired title by adverse possession. It matters not that she filed no declaration of her claim to the land, under section 1541 of the Code of 1896, as that statute only became effective in 1893, and her predecessors' possession had already ripened into title, and she went into possession under them by a contract of purchase. Moreover, if she purchased the land and was put in possession under a bona fide contract of purchase, she did not have to file a declaration in the probate office in order to hold adversely.—*Holt v. Adams*, 121 Ala. 664, 25 South. 716; *Sledge v. Singly*, 139 Ala. 346, 37 South. 98.

The trial court erred in not giving the general charge requested by the defendant. The judgment of the circuit court is reversed, and the cause is remanded.

Reversed and remanded.

DOWDELL, C. J., and MCCLELLAN and MAYFIELD, JJ., concur.

On Rehearing.

ANDERSON, J.—It is insisted by appellee's counsel that the plaintiff's title to the land, under the will of her father, Fannin, was subject to the life estate of her mother, and that the statute did not run against her until the death of her mother, the life tenant (a point not made in the original brief.) This rule would obtain if the possession of the defendant and her grantors started after the creation of the plaintiff's remainder or held under the life tenant; but in the case at bar the possession started before Fannin, the father, and husband of the life tenant, acquired the land, and the statute of limitations was and had been running for years before her death, and before the creation of the plaintiff's estate in remainder. It is settled law that after the statute begins to run no subsequent disability super-

[*Vadeboncoeur v. Hannon.*]

sedes its operation, unless by statutory provision.—*Baker v. Barclift*, 76 Ala. 417; *Black v. Pratt Coal Co.*, 85 Ala. 508, 5 South. 89; section 4860 of the Code of 1907. The statute, having started and run for years before the plaintiff's estate came into existence, was not intercepted because, by the terms of her father's will, her mother took a life estate in the land, and she was not entitled to same until her mother's death.

In the case of *Gindrat v. Western R. R.*, 96 Ala. 162, 11 South. 372, 19 L. R. A. 839, the defendant never went into possession of the land until after the execution and recording of the deed creating the remainder.

Vadeboncoeur v. Hannon.

Ejectment.

(Decided April 15, 1909. 49 South. 292.)

1. *Ejectment; Pleading; Issue.*—Where the general issue is pleaded as a defense to a statutory action in the nature of ejectment, a special plea of the statute of limitation is unnecessary and may be stricken.

2. *Ejectment; Tax Title; Tax Deeds; Evidence.*—Where the purpose of the offer is not stated and there is no evidence of a preceding valid sale the auditor's deed for land sold for taxes is properly excluded when offered as a muniment of title by defendant.

3. *Same.*—The Act of Feb. 9, 1895, (Acts 1894-5, p. 488) does not have the effect to confer upon purchasers the benefit of section 2310, Code 1907, and a docket of tax sales which fails to show a valid sale is inadmissible in ejectment.

4. *Same; Limitation.*—It is within the power of the Legislature to enact statutes of limitation placing purchasers holding tax deeds issued by the auditor under Acts 1894-5, p. 488, in a weaker position than that occupied by those holding deeds from the judge of probate issued under the general order in sales of lands for taxes.

APPEAL from Birmingham City Court.

Heard before Hon. C. W. FERGUSON.

[Vadeboncoeur v. Hannon.]

Action by Mattie B. Hannon against E. M. Vadeboncoeur in the nature of ejectment. From a judgment for plaintiff, defendant appeals. Affirmed.

ALLEN & FORT, for appellant. The court erred in sustaining the demurrers to the 4th plea.—*Page v. Youngblood*, 69 Ala. 296; *Lassiter v. Lee*, 68 Ala. 287; *Jones v. Randle*, 68 Ala. 258; *Long v. Boast*, 44 South. 955. The court erred in excluding the deed from the State Auditor.—*Trotter v. Moog*, 150 Ala. 460. The court should have admitted the Probate Docket.—*Trotter v. Moog*, *supra*; *Reddick v. Long*, 124 Ala. 260. The court erred in the charge given.—Authorities *supra*.

TILLMAN, GRUBB, BRADLEY & MORROW, and M. M. BALDWIN, for appellee. Plea four is defective.—*Crook v. Anniston*, 93 Ala. 4; *Johnston v. Harper*; *Trotter v. Moog*, 150 Ala. 460. In any event it was harmless error to sustain the demurrer.—*Webb v. Reynolds*, 139 Ala. 389. The court properly excluded the deed from the Auditor.—*Johnson v. Harper*, *supra*; *Trotter v. Moog*, *supra*; *Reddick v. Long*, 124 Ala. 261.

DENSON, J.—This is a statutory action of ejectment by Mattie Hannon against E. M. Vadeboncoeur to recover a tract of land in Jefferson county, particularly described in the complaint. The defendant, along with the plea of not guilty, filed a special plea, numbered 4, by which she sought to set up the statute of limitations of five years to defeat recovery by the plaintiff. The court sustained a demurrer to this special plea, and one of the grounds in the assignment of errors challenges this ruling of the court.

We have several times decided that (as in this action) the plaintiff carries "the burden of proving a le-

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gal right to the possession of the premises in dispute, and of consequence (that) whatever operates a bar to his right of possession causes him to fail, entitling the defendant to a verdict. Unless it be of matter puis darc in continuance, the defendant may not plead any other plea (than not guilty). It is unnecessary and is foreign" to the issue.—*Bynum v. Gold*, 106 Ala. 427, 17 South. 667; *Lomb v. Pioneer Savings & L. Co.*, 106 Ala. 591, 17 South. 670. Therefore, as the plea could well have been stricken for being inappropriate and immaterial, we need not upon this occasion stop to pass upon its sufficiency.

The land was sold by the tax collector of Jefferson county on the 20th day of June, 1892, for the taxes due for the year 1891, at which sale the state became the purchaser of "lot 23, in block 4, Chestnut street, Forest Hill surveys." It was agreed between the parties that the land was sold by the state under the act of February 9, 1895 (Acts 1894-95, p. 488), and that the Auditor, on the 27th day of February, 1896, executed a deed conveying to the defendant what interest the state had acquired at the sale had on June 20, 1892. The deed from the Auditor was duly acknowledged, and was recorded in the office of the judge of probate of Jefferson county April 4, 1896. The bill of exceptions recites that, upon the offer by the defendant of the deed from the Auditor, conveying "lot 23, in block 4, Chestnut street, Forest Hill survey," as evidence, the court sustained plaintiff's objection thereto.

The specific grounds of the objection were that "it was not shown that the state had title to the property at the time the conveyance was made. it was not shown that the proceedings under which said property was sold for taxes, when bought in by the state, were regular and valid, and sufficient in law to vest title thereto in

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the state, and because the said deed shows that the property thereby conveyed is not the property sued for in this cause." The defendant did not, in its offer of the deed, limit its evidence to any specific purpose; and in this state of the record it must be held that the court had the right to assume that the deed was offered as a muniment of title, and not simply for the purpose of bringing forward the statute of limitations of five years as a defense. (*Farley v. Bay Shell Road Co.*, 125 Ala. 184, 198, 27 South. 770); and, as it was incompetent evidence as a muniment of title without precedent evidence of regularity in the proceedings leading up to the tax sale, the court cannot be put in error for sustaining the objection.

It is not necessary to notice the other objections made to the deed.

For like reasons the ruling of the court, refusing to allow the docket of tax sales as evidence, must be held free from error. The docket falls short of showing that the statutory requirements essential to a valid sale were complied with. A stronger reason, however, why the court did not err in allowing the docket in evidence, is that it is not admissible under the statute.—Code 1886, § 605; Code 1907, § 2310. The sale to defendant, and the Auditor's deed, were confessedly made under the act of February 9, 1895 (Acts 1894-95, p. 488); and that act failed to confer upon purchasers of lands sold under its provisions the benefit of section 605, which was the right to offer, as prima facie evidence of the facts therein contained, books and records of the probate office.—*Doe v. Moog*, 150 Ala. 460, 43 South. 710.

The only remaining question is : Did the court err in giving the general charge for the plaintiff? The defendant frankly admits, in her brief, that if this court adheres to the ruling made in the case of *Doe v. Moog*,

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supra, the trial court cannot be put in error for giving that charge. The case of *Long v. Boast*, 153 Ala. 428, 44 South 955, it is argued by defendant, is in conflict with the *Doe-Moog Case*; but that contention falls to the ground upon a comparison of the facts of the two cases. The *Long-Boast Case* was where a purchaser, under a deed made to him by the judge of probate, after tax sale made under the general law, was claiming the benefit of the statute of limitations of five years. The Legislature has seen proper to place the two classes of purchasers on different footings. This was within the competency of the Legislature; and we cannot interfere with the statute enacted by that body, merely because it may be thought that purchasers holding deeds under the Auditor are by it placed in weaker position than that occupied by those holding deeds from the judge of probate.

No valid reason has been given why the court should overrule the case of *Doe v. Moog*, and we decline to do so, and here reaffirm that decision.

The judgment of the city court will be affirmed.

Affirmed.

DOWDELL, C. J., and SIMPSON and MAYFIELD, JJ., concur.

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Ejectment.

(Decided Jan. 21, 1909. Rehearing denied Feb. 16, 1909.
48 South. 665.)

1. *Evidence; Parol to Vary Writing; Deeds; Description.*—Where the description in the deed is unambiguous and fixes the corner of a lot at a certain point, parol evidence is not admissible to show that the corner was 12 feet from the point fixed in the deed.

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2. *Evidence; Declarations to Grantor.*—The declaration of the grantor made to the grantee at the time of the execution of the deed that the deed embraced erroneously a 12 foot strip on a certain side of the lot conveyed, are not admissible for the purpose of contradicting the unambiguous description in the deed.

APPEAL from Bullock Circuit Court.

Heard before Hon. A. A. EVANS.

Ejectment by R. M. Foster and others, executors, against George Carlisle and others, for a 12-foot strip of land. Judgment for defendants, and plaintiff's appeal Reversed and remanded.

Most of the facts appear in the opinion. Assignment of error 3 is as follows: "(3) In permitting the appellees to ask the witness J. P. Radford the following question, found on page 19 of the record, to-wit: 'Tell the jury what was the southern boundary line of the Chappell mill lot at the time Mr. Chappell owned it and conveyed it to you and your brothers, and also during the time you and your brother, C. R. Radford, owned it.'" The fourth assignment of error is the answer to this question, to-wit, that it was at a point 12 feet north of the Holmes building. The declarations referred to were those contained in the testimony of J. P. Radford, as follows: That at the time he and his brother, C. R. Radford, obtained the deed, a copy of which is attached, being the deed from H. C. Chappell and wife to him, Chappell told them there was a mistake in the description of said lot as contained in said deed, and that said deed described said lot as commencing at a point on Prairie street, and running thence south along said Prairie street to the two-story house on the lot owned by Holmes, and thence east to Mrs. Riley's lot, when there was in fact a space of about 12 feet immediately north of the Holmes building, and extending in an easterly direction, the length of the Holmes lot, which he (Chappell) did not claim—and the same statement by the witness Radford to Dr. Foster.

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J. D. NORMAN, for appellant. The court below committed error in permitting appellees to ask the question objected to and to permit the answers thereto of the witness Radford.—*Orthwein v. Thomas*, 11 Am. St. Rep. 159; *Cobb v. Oldfield*, 42 Am. St. Rep. 263; 2 Jones on Evid. sec. 496.

D. S. BETHUNE, and E. L. BLUE, for appellee. A grantee in a deed poll is not estopped to deny the title of the grantor.—*Cooper v. Watson*, 73 Ala. 252; 11 A. & E. Ency of Law, 400; 3 Brick. p. 447.

McCLELLAN, J.—The contest in this controversy involved the inquiry whether a certain strip of land in Union Springs, described in the complaint, belonged to the “Chappell mill lot,” as plaintiffs contended, or to the “R. R. Holmes lot,” as the defendants contended. The issue was one to be controlled by finding of fact. The errors assigned all relate to rulings of the court admitting testimony.

J. P. Radford was examined as a witness for the defendants. He was one of the grantees in the deed conveying the “Chappell mill lot” from ‘Chappell to the Radfords. This deed described the property conveyed as commencing at a point on “Prairie or Foster street, * * * running thence south along said Prairie street to the two-story house on lot owned by R. R. Holmes. * * *” The remaining parts of the description are not presently important, except in the respect that according to the deed, the “southwest corner” of the Chappell mill lot is fixed at the corner of the “two-story house on lot owned by R. R. Holmes.” J. P. Radford was asked by defendants this question: “Where was the southwest corner of the Chappell mill lot at the time Mr. H. C. Chappell sold and conveyed it to you and C.

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R. Radford?" The plaintiffs objected to the question upon the grounds (1) that it sought by parol testimony to alter, vary, or explain the unambiguous language of the deed from Chappell to the Radfords; (2) that it was illegal. The witness, the objection being overruled, testified that the mentioned corner of the "Chappell mill lot" was at a point 12 feet north of the north-west corner of the Holmes building. The plaintiffs' motion to exclude the answer, upon the grounds stated, was denied.

It is well settled that, where the description of property in a deed is unambiguous, parol evidence is not admissible to show a different subject-matter of conveyance to that and as described; but, if the description is ambiguous—may be referred to different properties—among other proper evidences of ambiguity, parol evidence is admissible to identify the property intended to be conveyed.—Jones on Ev. (2d Ed.) § 485; Id. (1st Ed.) § 496, and citations in notes; 17 Cyc. p. 616 et seq., and notes; *Griffin v. Hall*, 115 Ala. 482, 22 South. 162; *Chambers v. Ringstaff*, 69 Ala. 140; *Guilmartin v. Wood*, 76 Ala. 204. The description in the quoted deed is entirely unequivocal and unambiguous in its designation of the corner of the Chappell mill lot at the north-west corner of the Holmes building. The answer of the witness clearly contradicts this part of the description of the property purported to be conveyed. There is no room for cavil on that score. He was permitted to assert that the south terminus of the line stipulated in the deed was 12 feet north of the point to which the deed declared it to go.

The rulings assailed by assignments of error 3 and 4 are well taken, under the principle before stated, and on authorities in that connection cited.

The admission of declarations of grantors Chappell and Radford, respectively, to the witness Radford and

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Dr. Foster, respectively, to the effect that the deed from Chappell erroneously embraced a strip 12 feet south of the Chappell mill lot, was error. Those declarations were contradictory, as appears from their face, of the description borne by the deed referred to.

For the errors indicated, the judgment is reversed, and the cause is remanded.

Reversed and remanded.

TYSON, C. J., and DOWDELL and ANDERSON, JJ., concur.

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Ejectment.

(Decided April 6, 1909. 49 South. 248.)

1. *Public Lands; Grant of; Passing of Title.*—Where the Act granting the land provides that the title to the same shall pass on selection, the legal as well as the equitable title passes out of the government, without the issuance of a patent, upon the selection being made.

2. *Same; Bounty Land Warrants; Selection Under; Equity of Locator.*—Where a military bounty land warrant has been issued and the land located thereunder pursuant to the Act of Congress, and the approval of the land office, the locator obtains such an equity in the land as the state and Federal Court will protect, and gives to the locator an absolute right to the legal title and a patent, and renders void a patent issued to another in violation of the locator's equity.

3. *Same; Liability to Taxation.*—Until the full equitable title has passed out of the government public lands are not subject to taxation by state authority.

4. *Same; Grants; Government Control.*—The government can convey by patent or Congress may, by act, grant the legal title of public lands to a stranger, unless the equity of a locator of public lands has become complete.

5. *Same; Transfer of Title From Government.*—The doctrine that the legal title to land relates back to the inception of the grantee's equity is a pure legal fiction adopted solely to protect and preserve the legal title subsequently to be acquired and not to defeat it.

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6. *Same; Bounty Warrants; Assignment; Insufficiency; Effect on Equity of Holder.*—Where the records of the land office show that the selection of land under a military bounty warrant was suspended by the commissioner of the general land office because of the insufficiency of the assignment of the warrant, the equity of the assignee as the locator of the land was not perfected until the assignment was made good.

7. *Adverse Possession; Government.*—Adverse possession does not run against title to land so long as the title remains in the general government.

8. *Same.*—Section 1813, Code 1896, is intended to perfect the title of the government, or the title acquired thereunder through certification and is not intended to benefit a party claiming against a holder of such certificate, or a patentee; and if it were, it could not operate to give such a person title by adverse possession, since to do so would defeat the title of the general government, the state legislature cannot pass title to the public lands without the consent of the general government.

APPEAL from Chilton Circuit Court.

Heard before Hon. A. H. ALSTON.

Ejectment by Thomas B. Dennis and others against Houston Price and others. From a judgment for plaintiff defendants appeal. Affirmed.

WILLIAM A. COLLIER, for appellant. Under the facts in this case, the appellant showed an adverse holding.—Sec. 1813, Code 1896; *Case v. Edgeworth*, 87 Ala. 203; *Dillingham v. Brown*, 38 Ala. 311; *Goodlett v. Smithson*, 5 Port. 245. The location of a bounty line warrant upon land is a purchase in law of the land from the government.—*Bullock v. Wilson*, 5 Port. 338; 133 U. S. 353; 128 U. S. 456; 10 How. 348; *Erwin v. Erwin*, 9 Wall. 617; *Stark v. Starn*, 6 Wall. 402; *Gipson v. Courtney*, 13 Wall. 92; *Shepley v. Cowan*, 91 U. S. 330.

MCCORVEY & HARE, C. J. TORREY, and SMITH & MIDDLETON, for appellee. In support of our contention that the ruling of the trial court is entirely proper, we cite the following cases.—*Redfield v. Parks*, 132 U. S. 239; *Lowery v. Baker*, 141 Ala. 600; *Stringfellow v. T. C. I. & R. R. Co.*, 117 Ala. 250; *Sterens v. Moore*, 116 Ala.

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379; *Wiggins v. Kirby*, 106 Ala. 262-5; *Wagnon v. Fairbanks*, 105 Ala. 527; *Swan, et al. v. Gaston*, 87 Ala. 569; *Farley v. Smith*, 39 Ala. 38; *Iverson v. Dubose*, 27 Ala. 418; *Doe Chastang v. Dill*, 19 Ala. 421; *Kennedy v. Townsley*, 16 Ala. 239; *McIlhiney v. Ficke*, 61 Mo. 329; *Black v. T. C. I. & R. Co.*, 93 Ala. 109; Sec. 2448 U. S. Rev. St.; *Anzar v. Miller*, 90 Cal. 342 (27 Pac. 299.); *Churchill v. Sowards*, 78 Ia. 472; 43 N. W. 271.

MAYFIELD, J.—It was admitted that Thomas E. Dennis and Robert M. Dennis were the only heirs at law of Pollard M. Dennis, that Pollard M. Dennis was dead, and that his estate owed no debts. Plaintiffs (appellees here) offered a patent to the lands sued for, from the United States, of date October 10, 1904, issued upon land warrant No. 56,305, which was originally issued to one Edward Gantt, and assigned by him to Pollard M. Dennis, the patentee. The plaintiffs thereupon rested their case.

The defendants (appellants here) then offered in evidence a certified transcript from the General Land Office of the United States, purporting to be a copy of the register's and receiver's certificate of location No. 216, made at Greenville, Ala., upon warrant No. 56,305, for 160 acres of land, Act 1855; also exact copies from the Abstract of Warrant Location and Suspension Docket C. 4—207, in relation to said warrant. These abstracts show the issuance to Edward Gantt of military bounty land warrant No. 56,305, dated February 16, 1857; its receipt in the land office at Greenville, Ala., November 7, 1859, with the accompanying application for its location upon the lands in the suit; the certificate of the receiver and register of the Greenville land office that the location was correct; and its suspension, by the General Land Office, because of improper or blank assignment

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to Dennis. The indorsements on the papers show that the assignment became good September 29, 1904. The defendants then offered a transcript of the United States land office at Montgomery, relative to 80 acres of the land in controversy, setting forth the entries therein shown by the records of that office, which were not in conflict with entries from General Land Office above set out. This paper was excluded on motion of plaintiffs.

Defendants then offered in evidence a tax deed to S. $\frac{1}{2}$ of S. W. $\frac{1}{4}$, section 10, township 22, range 14, made by the probate judge of (then) Baker county, of date April 10, 1872, under sale made of said lands for taxes, year 1869, to A. B. Hill; a deed from Hill and wife to R. J. Hill, of date February 14, 1881; a deed from R. J. Hill to Mrs. D. A. Cain, of date January 15, 1884; a deed from Mrs. D. A. Cain and husband to G. W. Sorrell, of blank date; a deed from G. W. Sorrell and wife to J. R. Cain, of date May 16, 1893; a deed from J. R. Cain and wife to Reuben Price, of date August 13, 1897; and a deed from Reuben Price and wife to Houston Price, of date March 19, 1900—and in connection with each of said deeds defendants offered evidence to show that the grantees therein went into possession under them, and remained in possession until the property was transmitted to their successors in title, down to the date of the trial. These deeds and the evidence of possession were excluded by the court on plaintiffs' motion; and the affirmative charge was given for plaintiffs.

The legal question involved in this appeal, and upon which the rights of the parties to this action solely depend, is: Was the possession of the defendants, and those under whom they claim, for 30 years or more, such an adverse holding, as against plaintiffs and those

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under whom they claim, as to ripen into title, and thus defeat plaintiffs' legal title acquired by patent from the United States? It is conceded by appellants that adverse possession cannot run against the United States; but they insist that the title had passed out of the United States by the location of the land warrant, and that the patent was mere evidence of the grant, and related back to the time of the location of the grant.

If Congress had granted the land, and had thereby provided that the title should pass on selection as provided for in the act, the date of the selection would be the date of the passage of the legal title, as well as the equitable title, out of the government. The legal title can pass out of the United States as well by such a grant of Congress as by a patent, and if a patent is issued thereafter it may be that it is merely evidentiary of the prior grant and selection. But this is not the case in the present action. It was intended by Congress that the patent should pass the legal title, and that it should not pass until the patent was issued.

It is true that after the issue of the warrant, and the location of the land thereunder, in accordance with the act of Congress providing for such cases, and the location is approved by the Land Department of the government as provided, the person so locating thereby obtains such an equity as the state and federal courts will protect, and one which gives him an absolute right to the patent and the legal title, and that if a patent should be issued to another, in violation of his equity, it would be void for lack of authority to issue; and if the patent is subsequently issued to him, in accordance with his perfect equity thus acquired, by a legal fiction which the law creates for the protection, but not for the defeat, of his title, it relates back to the date of the completion of his perfect equity. It is also true that, when the full

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equitable title has passed out of the United State, then, and not until then, it becomes subject to state taxes, or to the claims of the creditors of the person holding the equity, as against the United States.—*Hussman v. Durham*, 165 U. S. 144, 17 Sup. Ct. 253, 41 L. Ed. 664.

Until the equity of the locator is complete, the United States can convey by patent, or grant by act of Congress, the legal title to a stranger; and until the alienation is thus completed the land remains subject to government control, and is not subject to state control, or to the control of the locator as against the government itself, though it might be as to other parties.—*Prescott's Case*, 16 Wall. 603, 21 L. Ed. 373; *McShane's Case*, 22 Wall. 444, 22 L. Ed. 747; *Tucker's Case*, 22 Wall. 527, 22 L. Ed. 805; *Colorado Co. v. Commissioners*, 95 U. S. 295, 24 L. Ed. 495. The doctrine of legal title relating back to the inception of the equity, contended for by appellants, is not availing to them under the facts of this case. This doctrine is a pure and legal fiction, adopted by the courts solely to protect and preserve the legal title, subsequently acquired, and not to defeat it. It would be applied here, if this were necessary, to protect the title of the patentee, but not to defeat it. If the defendants claimed through the patentee—that is, were privies in title to him—then the doctrine might be indulged for their protection; but they claim against, and not through, this title.

Another reason why defendants' claim of adverse possession cannot be availing, in this case is that the record shows that the equitable title of the patentee was never perfected until a very short time before the issue of the patent. The records of the Land Office show that the location of this land in question, under that warrant, was suspended by the Commissioner of the General Land Office of the United States because of insufficiency

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of the transfer or assignment of the warrant; hence the equity was never perfected until the assignment was made good. Until then the Land Commissioner could have refused to locate the lands under the warrant, or to issue patent. This brings the case squarely within the rule laid down by this court in *Stringfellow's Case*, 117 Ala. 250, 22 South. 997, and cases there cited.

Our statute (Code 1896, § 1813), providing that certain certificates issued under acts of Congress, or by the register of the land office, etc., vest a legal title in the holder, etc., cannot benefit the defendants. It was never intended to benefit a party claiming, as the defendants are claiming here, against the holder of such certificate or the patentee; but, even if it were so intended, it could not so operate in this case, because it would have to defeat the title of the United States, which it cannot do. The statute was evidently intended to protect the title of the United States, or title acquired thereunder through such certificates. The Legislature of Alabama could not, if it would, pass title to land out of the United States.—*Lowery v. Baker*, 141 Ala. 600, 37 South. 637; *Knabe v. Burden*, 88 Ala. 436, 7 South. 92.

The defendants' evidence was therefore properly excluded, and the general affirmative charge properly given for plaintiffs.

The judgment of the court below is affirmed.

DOWDELL, C. J., and SIMPSON and DENSON, JJ., concur.

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Ejectment ant Mandamus.

(Decided April 15, 1909. 49 South. 253.)

1. *Ejectment; Pleading; Initial Process.*—In common law ejectment the service of the declaration with the notice is the initial process in the cause and takes the place of a summons and complaint against the person in possession.

2. *Same; Notice; Subscription.*—The notice annexed to the declaration served in common law ejectment should be subscribed with the name of the casual ejector, to be regular; but though formerly, such proceedings were set aside for an irregular signature, later it is recognized as sufficient if it is subscribed with the name of the plaintiff's lessor or of any other person.

3. *Same; Failure of Person in Possession to Come In; Judgment.*—Where the person really in possession fails to come in after service of the declaration and notice in common law ejectment, the first judgment that should be rendered is a judgment nisi against the casual ejector, unless the tenant in possession appears and pleads to an issue within a certain time mentioned in the rule, and after the time set the judgment is made final against the casual ejector, but not against the real person in possession.

4. *Judgment; Default; Setting Aside.*—The courts are very liberal in setting aside a regular default judgment in ejectment to let the tenant in to defend his possession, where there is merit in his defense.

5. *Same; Default Judgment; Process to Sustain.*—Although the pleadings in default ejectment are fictitious, if a plaintiff adopts that mode of action, it should be pursued in accordance with the law establishing the procedure; and where the notice is not signed by anyone a default judgment rendered and made final not only against the casual ejector but also against the persons in possession, is void, since the declaration and notice takes the place of the summons and complaint.

APPEAL from Birmingham City Court.

Heard before Hon. C. W. FERGUSON.

Ejectment by the Tennessee Coal, Iron & Railway Company against Mrs. Mary Wise, and others. Default judgment was rendered against the defendant, which on motion was set aside and a writ of ouster issued against the plaintiff. Plaintiffs move to set aside the order

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vacating the judgment and issuing the writ. These motions being overruled, plaintiff appeals and asks for a writ of mandamus requiring the judge to vacate the order and quash the writ of ouster. Affirmed and mandamus denied.

PERCY & BENNERS, for appellant. The remedy pursued in seeking mandamus here is authorized by *Ex parte Tower Mfg. Co.*, 103 Ala. 415. The notice need not have been signed.—Sec. 4143, Code 1896; *Ware v. Swann & Billups*, 97 Ala. 334; Angell on Limitations, secs. 311-12.

BUSH & BUSH, for appellee. Defective service cannot be cured by amendment or affidavit at a subsequent term.—*Harris v. Martin*, 39 Ala. 556; *Shepherd v. Powell*, 50 Ala. 377; *Stone v. Harris*, Minor 32. A complaint must be signed by either the complainant or clerk.—*Stone v. Harris, supra*; *Browder v. Gaston, et al.* 30 Ala. 677. Mining rights include incorporeal hereditaments lying in grant but not in seizin, and are, therefore, not the subject of ejectment.—*L. & N. R. R. Co. v. Matthews*, 136 Ala. 156.

SIMPSON, J.—This is an action of ejectment, the declaration being by John Doe against Richard Roe, and accompanied by a notice addressed to Mrs. Mary Wise, Joe Wise, and Cavvie Wise, in the usual form, but not signed by Richard Roe, or by any one else. The return of the sheriff shows that a copy of said declaration and notice was duly served on said Mrs. Mary Wise, Joe Wise, and Cavvie Wise. None of said parties appearing when the case was called, judgment by default was rendered against Richard Roe, Mrs. Mary Wise, Joe Wise, and Cavvie Wise. At a subsequent term of the court

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the defendants appeared and moved the court to vacate and set aside said judgment, which motion was granted, and a writ of ouster issued. The plaintiff then made a motion to set aside and vacate said last-named order, which was overruled, whereupon the plaintiff appealed to this court, and has also filed in this court a petition for a writ of mandamus to be directed to the judge of the city court of Birmingham, requiring him to vacate and set aside the orders vacating and setting aside the judgment in favor of the petitioner, and to quash the writ of ouster which had been issued against petitioner.

Without adverting to the history of the common-law proceedings through which the action of ejectment was finally evolved, it is sufficient to say that in its final form it is a fictitious action, in which "A., the person claiming title, delivers to B., the person in possession, a declaration in ejectment, in which C. and D., two fictitious persons, are made respectively plaintiff and defendant, and in which C., states a fictitious demise of the lands in question from A., to himself for a term of years, and complains of an ouster from them by D., during its continuance. To this declaration is annexed a notice, supposed to be written and signed by D., informing B. of the proceedings, and advising him to apply to the court for permission to be made defendant in his place, as he, having no title, shall leave the suit undefended. Upon the receipt of this declaration, if B. do not apply within a limited time to be made defendant, he is supposed to have no title to the premises." Judgment is then entered against the casual ejector, D., and the possession of the lands will be given to A., the party claiming the title.—Tillinghast's *Adams on Ejectment*, p. 17 (*15, 16); *Warville on Ejectment*, 11. The service of the declaration, with the notice, is the initial process of the case, and serves the purpose of a summons and complaint

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against the person in possession of the land.—Tillinghast's Adams on Ejectment, p. 206, and notes. "The notice should regularly be subscribed with the name of the casual ejector," and, although formerly proceedings were set aside "for an irregular signature," yet it was later recognized as sufficient if it was "subscribed with the name of the lessor of the plaintiff, or of any other person."—Tillinghast's Adams, 233, and notes.

The authorities seem to indicate that the notice must be signed by some one, yet it is true that this is merely a fictitious form, and Richard Roe is really no one; but, if the informality of the notice not being signed could be overlooked, the office of the notice seems to be to give the real party in possession an opportunity to come in and defend his title, and, if he does not come in, it is difficult to see how a judgment could be rendered against him, he not having been made a party to the suit, either by the original process or by coming in. It is true that the final judgment against the casual ejector has substantially the same effect as if the officer is ordered to put the plaintiff in possession of the premises. However on failure of the person really in possession to come in, the first judgment seems to be a judgment nisi against the casual ejector, "unless the tenant in possession appear and plead to issue within a certain time mentioned in the rule."—Tillinghast's Adams, 248 and notes; *Jackson ex dem. Van Alen v. Vischer*, 2 Johns. Cas. (N. Y.) 106; *Jackson ex dem. Quackenboss v. Woodward*, 2 Johns. Cas. (N. Y.) 110; *Gardiner v. Lessee of Murry*, 4 Yeates (Pa.) 560; *Ware v. Swann & Billups*, 79 Ala. 330, 334. After the time set, the judgment is made final against the casual ejector, but not against the real person in possession.—Id.; Tyler on Ejectment and Adverse Enjoyment, pp. 439, 440. It is also said that, "where the defendant has merits, the courts are very liberal in

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setting aside a regular default, upon just and equitable terms, to let in the tenant to defend his possession.”—Tyler on Ejectment and Adverse Enjoyment, p. 441.

It is true that the pleadings are fictitious, yet, if the plaintiff adopts this mode of action, it should be pursued in accordance with the law which established those fictitious proceedings. All of the cases which we have found seem to hold that the notice should be at least signed by some one; and, if the service of the declaration and notice serve the purpose of a summons and complaint (as was held by our own court in the case of *Ware v. Swann & Billups*, *supra*,) there should be at least that degree of strictness which is required in actions commenced by summons and complaint, and this court has held that a summons not signed by the clerk will not support a judgment by default.—*Wilson v. Owens, Adm'*, 45 Ala. 451. So, taking into consideration the absence of any name to the notice, and the fact that the judgment was made final, not only against the casual ejector, but against the appellees, we hold that the judgment was void, and properly set aside by the court.—*Buchanan v. Thompson*, 70 Ala. 401.

The judgment of the court is affirmed, and the writ of mandamus denied.

DOWDELL, C. J., and DENSON and MAYFIELD, JJ., concur.

[Gambill v. Cooper.]

Gambill v. Cooper.*Unlawful Detainer.*

(Decided April 16, 1908. Rehearing denied Feb. 5, 1909.
48 South. 691.)

1. *Appeal and Error; Decision on Appeal; Law of the Case.*—The ruling on former appeal that the cause was begun by the proper plaintiff is decisive of the question on a subsequent appeal.

2. *Same; Harmless Error; Admission of Evidence.*—Where there is other undisputed competent evidence of the same fact the admission of incompetent evidence as to that fact is harmless.

3. *Same; Presumption.*—Where the bill of exceptions does not purport to set out all the evidence in the case, in support of the court's action in giving the general charge, the presumption will be indulged on appeal that the evidence was undisputed.

4. *Landlord and Tenant; Unlawful Detainer by; Pleading.*—Although no provision is made in the statutory form for an averment as to the terms of the lease contract, if the form used complies substantially with the form required by form 27, Code 1896, the complaint will be sufficient, although the terms of the lease contract is set out therein.

5. *Landlord and Tenant; Unlawful Detainer; Damages; Rent Pending Appeal.*—Section 2146, Code 1896, provides for the recovery of rent pending an appeal in unlawful detainer cases, and hence evidence as to the rental value of the premises pending the appeal was admissible.

6. *Same; Demand; Notice; Sufficiency.*—Where the lease provided that if the premises should be sold during the term of the lease the lessee would give possession thereof after reasonable notice of the sale, a notice of such sale given more than forty days before a written demand for possession, is a reasonable notice under the lease.

7. *Pleading; Pleas in Abatement; Disallowance; Discretion.*—Where a term of court had been allowed to lapse after the disability arose and before the plea was offered, and the plea did not go to the merits of the case, but only to the disability of one of the parties, it was within the discretion of the court to refuse to allow it to be filed.

APPEAL from Jefferson Circuit Court.

Heard before Hon. A. O. LANE.

Unlawful detainer by H. D. Cooper, for the use of A. E. Leishman, against A. A. Gambill. From a judgment for plaintiff, defendant appeals. Affirmed.

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The complaint was in the following language:

Count 1: "Plaintiff sues to recover possession of the following tract of land, to wit: (Here follows a description of the land)—of which he was in possession, and upon which, pending such possession, and before the commencement of this action, the defendant lawfully entered, on the demise of the plaintiff, for one year, namely, from the 1st day of October, 1899, to the 30th day of September, 1900. And the plaintiff avers that as a part of the consideration for said lease the defendant promised therein that, in case the said premises were sold during said term described above, he would give possession of said house and lot, after reasonable notice had been given of said sale and that possession of the said premises was wanted. And plaintiff further avers that he sold said premises during said term to A. E. Leishman, and that the said defendant was given such a notice more than 40 days before the bringing of this suit, and more than 40 days before written demand was made for the possession of the premises, which written demand the plaintiff hereby avers was made by the plaintiff in writing before the bringing of this suit and in accordance with the statute. The plaintiff further alleges that the defendant doth continue to unlawfully detain the said premises. The plaintiff further claims \$100 for the detention of said premises."

Count 2: Same as 1, down to and including the words "of September, 1900," where they occur in said first count, with the following addition: "With the condition which was written in and made a part of the lease or contract of demise between the plaintiff and the defendant that the defendant, in the event the plaintiff sold the said premises, was to give possession of the same, if required to do so, within a reasonable time thereafter. And plaintiff avers that he did sell said premises during

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said term, on, to wit, April 20, 1900, to said A. E. Leishman, of which sale the defendant was duly notified and informed, and the defendant was duly notified and required to give possession of said premises in accordance with the terms of the said lease contract; but the defendant failed and refused to give possession of said premises within a reasonable length of time thereafter. And the plaintiff further avers that the defendant, after the termination as aforesaid of his possessory interest in and to the premises, and after the plaintiff's demand in writing therefor, which was duly made before the bringing of this suit, has unlawfully detained the said above-described premises at and before the time of the commencement of this suit, and did unlawfully detain the same for a long time thereafter. Plaintiff avers that he claims the sum of \$100 for the detention of said premises, and as a penalty for damage of holding over."

Demurrers were interposed as follows: To the complaint as a whole: "(1) That the aggregate amount claimed in the several counts thereof exceeds \$100, and therefore exceeds the jurisdiction of the justice of the peace, before whom the suit originated. (2) For that this suit is not properly brought in the name of a nominal plaintiff, and may not be brought in the name of one party for the use of another. (3) No sufficient cause therein is shown why a recovery should be had for the use of Leishman." To the first count of the complaint as follows: (1) For that it does not sufficiently show the termination of defendant's possessory interest in the premises sued for before demand for the possession of same was made. (2) It does not sufficiently appear therefrom that plaintiff was entitled to the possession of said premises at the time the suit was instituted. (3) For that it does not sufficiently appear therefrom that the plaintiff demanded in writing the possession of the

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said premises by the defendant. (4) For that, after a sale of said premises, the demand for possession thereof should have been made by the purchaser." The same grounds were interposed to count 2.

The record shows that defendant tendered in court and asked permission and moved the court for leave to file the following plea: "The defendant, for plea to the complaint, says that on, to wit, the 18th day of October, 1906, said A. E. Leishman was duly adjudged a bankrupt by the District of the United States for the Southern Division of the Northern District of Alabama, which had jurisdiction of the subject-matter and the parties to said proceedings. Wherefore the defendant says that this suit ought to abate." This plea was sworn to.

The substance of the lease is as set out in the complaint, and its execution was proven.

Motion was made to suppress the deposition of Leishman on the following grounds: "(1) The residence of the said witness is not given with the particularity required by law. (2) The residence of said commissioner is not given with the particularity required by law. (3) The defendant has not been notified of the residence of said witness, nor of the residence of said commissioner, with the particularity required by law, and has not been notified at what point in Jefferson county said witness resides, nor at what point in the city of Charlotte said commissioner resides."

The record shows that the notice served on the defendant for the taking of said deposition, and the affidavit on which same was taken, showed nothing as to the residence of the commissioner and the witness, other than that the witness resided in Jefferson county, Ala., and was temporarily in North Carolina, and would not return to Alabama before the trial, and that the commissioner, Yeager, resided in Charlotte, N. C., and that

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within the time allowed for filing cross-interrogatories the defendant had filed written objections to the taking of the deposition and the appointment of said Yeager as commissioner, and notice that he would move to suppress the same at the trial on the grounds set out above.

GEORGE HUDDLESTON, and JOHN W. ALTMAN, for appellant. Each count of the complaint is considered as a statement of a different cause of action.—*Bryant v. Southern Railway Co.*, 137 Ala. 491; *Childress v. Mann*, 33 Ala. 206. A notice necessary to terminate a periodical tenancy must specify the time of its termination. A general notice to quit, indicating no time, is insufficient. The notice must terminate the tenancy at some time when it is terminable, that is at the end of some period. A tenant cannot be required to quit at some intermediate date.—*McDevitt v. Lambert*, 80 Ala. 536; Taylor's Landlord & Tenant, Sec. 476, 477, (9th Ed.); 18 A. & E. En. Cyc. Law, 205 (2nd Ed.); *Steward v. Harding*, 2 Gray 335; *Ayres v. Draper*, 11 Mo. 548. To support unlawful detainer, the demand for possession must be made after the termination of the tenant's possessory interest. A demand cannot be made when the tenant is in rightful possession.—*McDevitt v. Lambert*, 80 Ala. 536; Code Sec. 2127. Form of Complaint 27, Code p. 948. A notice to terminate a periodical tenancy must be given for a time equal to the interval between the times of the payment of rent. When the rent is payable quarterly there must be a quarter's notice, when payable monthly a month's notice, etc. The court cannot judicially determine that in this case the periodical tenancy was terminable by thirty days notice.—*McDevitt v. Lambert*, 80 Ala. 536; *Cooper v. Gambill*, 146 Ala. 184; Taylor's Landlord & Tenant, Sec. 475 (9th Ed). Where a lease

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stipulates that the lease is terminable in case of a sale, the election to terminate is for the benefit of the purchaser and must be exercised by him.—*Cooper v. Gambill*, 146 Ala. 184. In a tenancy terminable by the sale of the premises, demand for possession must be made by the purchaser to sustain unlawful detainer.—*Cooper v. Gambill*, 146 Ala. 184. The bankruptcy of a plaintiff pending a suit may be pleaded as a bar to its further prosecution.—*Lacy Terrell & Co. v. Rockett*, 11 Ala. 1002; *Davis v. Davis*, 93 Ala. 173; 4 Mayfield Dig. 475 et seq.; Collier on Bankruptcy, 548 et seq. (2d Ed.); Bankruptcy Law of 1898, Secs. 110 and 78. Deeds are not self-proving where acknowledged before a foreign notary unless the acknowledgment is certified under his official seal.—*Carhart v. Clark*, 31 Ala. 396; *Hart v. Ross*, 57 Ala. 518; *Goree v. Wadsworth*, 91 Ala. 416; Code Sec. 994. A motion for judgment on a supersedeas bond given in unlawful detainer for appeal to the Circuit Court should be made independently of the trial of the unlawful detainer suit, should be in writing and should tender some issue. Evidence of the rental value of the premises pending the suit is irrelevant in the unlawful detainer suit.—Code Sec. 2146. Notice of the filing of interrogatories should specify the residence of the witness and proposed commissioner with sufficient accuracy as that by a reasonable effort they can be located and identified.—Code Section 1835.

BROWN & MURPHY, and JAMES A. MITCHELL, for appellee. Each count of the complaint stated a cause of action and the demurrer to the whole complaint was properly overruled.—24 Cyc. 465, et seq. The suit was properly brought by Cooper for the use of Leshman.—*Cooper v. Gambill* 146 Ala. 184; *Dwyne v. Brown*, 35 Ala. 596. The demurrer to each count was properly

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overruled.—*Cooper v. Gambill, supra*. It was within the discretion of the court to permit the plea to be filed.—*Beck v. Glenn*, 69 Ala. 126. Besides, the plea was frivolous.—Sec. 11, Bankruptcy Act. It was proper to show the rental value of the property.—Sec. 2146, Code 1896; *Giddens v. Bolling*, 92 Ala. 586. Since the bill of exceptions does not show that it contains all the evidence, the presumption is indulged that there was evidence supporting the affirmative charge.—*Clardy v. Walker*, 132 Ala. 264; *Sanders v. Steen*, 128 Ala. 633. The court properly rendered judgment against the defendant and sureties on the supersedeas bond for the rent accruing, pending the appeal.—*Gidden v. Bolding, supra*; *Lykes v. Schwartz*, 91 Ala. 461; *Waite v. Ward*, 93 Ala. 271.

DOWDELL, J.—This is an action of unlawful detainer, commenced in the justice court and carried by appeal from that court into the circuit court. In the circuit court the plaintiff obtained a judgment, from which the defendant appeals to this court.

This is the second appeal in this case to this court.—*Cooper v. Gambill*, 146 Ala. 184, 40 South. 827. On the present appeal there are 18 assignments of error on the record. Of these the fifth, seventh, eleventh, and twelfth assignments are expressly abandoned by the appellant.

The first, second, and third assignments of error go to the trial court's ruling on the demurrers to the complaint. When the case was here on former appeal, it was then decided by this court, that the suit was properly instituted in the name of Cooper. And we may here say that the words "for the use," etc., may be regarded as surplusage, and there is therefore no merit in the ground of demurrer again raising this question.—*Reese v. Reaves*, 131 Ala. 195, 31 South. 447, and cases there cited.

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We were at first of the opinion that the complaint was subject to the demurrer interposed by the defendant, but upon more mature consideration we have reached a different conclusion. While the terms of the lease contract are averred in each of the counts of the complaint, yet each of said counts in its averments is in substantial compliance with the form given in the Code for unlawful detainer suit.—Code 1896, p. 948, form 27. The demurrers to the complaint were, therefore, properly overruled.

The plea offered to be filed by the defendant at the time of the trial, and which was disallowed by the court, we think, under the circumstances, was a matter addressed to the discretion of the court. If the plea be considered as sufficient in its averments to constitute a good plea, it only went to the personal disability of Leishman, for whose use the suit was brought, arising after suit commenced, and in the nature of a plea in abatement. It did not go to the merits of the suit, and, if allowed, the suit could have continued for the use and benefit of the trustee in bankruptcy. Moreover, a term of the court had been allowed to pass after the disability arose before the plea was offered, and then not until after the trial was reached, late in another term of the court. As stated above, we think, under the facts, it was a matter addressed to the discretion of the court.

If there was error in admitting in evidence the deed from A. Cooper and Clara W. Cooper to Leishman, it was harmless, as there was other evidence, which was undisputed, of a sale by the plaintiff.

The motion to suppress the deposition of Leishman on the ground stated was without merit, and properly overruled.

It was permissible to show the rental value of the leased property pending the appeal, and to have recovery of

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the same on plaintiff's motion.—Code 1896, § 2146; *Giddens v. Bolling*, 92 Ala. 586, 9 South. 274.

The evidence showed that notice of the sale and a requirement of the possession of the property under the terms of the lease contract was given the defendant for at least 40 days before the demand in writing for possession was made. Forty days was, in law, a reasonably time given the defendant to quit, and was sufficient to terminate his possessory interest under the lease. The evidence also showed a demand in writing for possession before suit. The court was justified, under the evidence, in giving the general charge requested by the plaintiff; and, since the bill of exceptions does not purport to set out all of the evidence in the case, it will be presumed, in support of the court's action that the evidence was undisputed.

We find no reversible error in the record, and the judgment will be affirmed.

Affirmed.

TYSON, C. J., and SIMPSON, MCCLELLAN, and MAYFIELD, JJ., concur.

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Forcible Entry and Detainer.

(Decided April 8, 1909. 49 South. 255.)

1. *Estoppel; Position Assumed.*—Where one with knowledge of the facts assumes a particular position in judicial proceedings such one is estopped to assume a position inconsistent therewith to the prejudice of the adverse party; so, where a defendant, in order to carry a case of forcible entry and detainer from the justice to the circuit court under a section 4283, Code 1907, makes an affidavit that he entered the premises peaceably and not under claim of any agreement, contract or understanding with the plaintiff, such defendant is estopped to introduce evidence in contradiction of the affidavit.

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2. *Landlord and Tenant; Title of Landlord; Estoppel of Tenant.*—A tenant cannot make a valid attornment to another, nor by mere acquiescence authorize another to violate the possession which he holds for the landlord, the duty being upon the tenant to bear fealty to his landlord.

3. *Forcible Entry and Detainer; Persons Entitled to Sue; Right of Tenant.*—Where the tenant's consent to the entry and removal of the fence was in violation of the duty the tenant owed to the landlord, the tenant was entitled to bring forcible entry and detainer for the possession of the lands so occupied although the entry and removal of the fence was done in a peaceful manner.

4. *Same; Title of Defendant.*—Where it appears that defendant's entry was acquiesced in by the plaintiff, thus constituting it an entry by agreement, the defendant cannot introduce evidence to show title in himself in an action in forcible entry and detainer. (Section 4285, Code 1897.)

5. *Same; Evidence; Relevancy.*—The character of the house kept by plaintiff is irrelevant as evidence in an action for forcible entry and detainer.

6. *Attorney and Client; Authority to Bring Suit; Mode of Questioning.*—The authority of an attorney to bring suit is presumed, he being an officer of the court; if the authority is questioned, the matter should be determined by motion, and addressed to and decided by the presiding judge, so as not to be mingled with the merits of the controversy at the hearing.

APPEAL from Jefferson Circuit Court.

Heard before Hon. A. A. COLEMAN.

Forcible entry and detainer by Mary Brown v. A. H. French. From a judgment, for defendant plaintiff appeals. Reversed and remanded.

For former report of this case, see *Brown v. French*, 148 Ala. 272, 42 South. 409.

BROWN & MURPHY, for appellant. One cannot get the circuit court to exercise its jurisdiction and remove a case of this character from an inferior court in order to try title on a sworn statement of facts, and then testify to an exactly opposite state of facts to avoid the affirmative charge.—*Hodges v. Winston*, 95 Ala. 514; *Railway Co. v. McCarty*, 96 U. S. 267; *Boyett v. Standard C. & O. Co.*, 41 South. 756; *Ex parte Southern Tel. Co.*, 73 Ala. 564; *Hughes v. Dundee*, 28 Fed. 40; 13 S. E. 188; 16 Pac. 88; 24 A. & E. Ency of Law, 811. Where de-

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fendant enters by force or threat, no demand is necessary.—*Knowles v. Ogletree*, 96 Ala. 555. If a defendant dispossesses one by the use of force, such an one is not required to prove title in this character of action.—*Mallon v. Moog*, 121 Ala. 303; *Fearn v. Beirn*, 129 Ala. 435; Sec. 2149, Code 1896. The entry in this case is made by force and the defendant cannot inquire into the title.—*Mallon v. Moog, supra*. It is no answer that the plaintiff has been guilty of some wrong towards the defendant, and has previously entered by force, and detained the premises.—*Bibb v. Thomas*, 131 Ala. 350. The issues are upon the defendant's forcible entry.—*Hausfield v. Adams*, 10 Ala. 9. Adverse possession avoids a deed executed by one out of possession at the time it was made.—*Bernstein v. Humes*, 71 Ala. 260; *Murray v. Hoyle*, 92 Ala. 563; *Davis v. Curry*, 85 Ala. 134; *Pearson v. King*, 99 Ala. 127; *Yarbrough v. Avant*, 66 Ala. 526. Holding land and fencing it in is such possession as will support an action for forcible entry and detainer, even if the possession be acquired unlawfully.—*Mallon v. Moog, supra*; 84 Am. Dec. 68; 77 Ill. 169; 8 A. & E. Ency of Law, 121.

FRANK S. WHITE & SONS, for appellee. Under the facts in this case, the trial court very properly refused to direct a verdict for the plaintiff.—*Fairly v. Bay Shell Road Co.*, 125 Ala. 184; Sec. 2126, Code 1896.

SIMPSON, J.—This action of forcible entry and detainer was commenced in the justice of the peace court by the appellant against the appellee, and was removed into the circuit court by the defendant's making affidavit in accordance with section 2147 of the Code of 1896 (section 4283, Code 1907). On a former appeal this court held that the plaintiff was entitled to the general charge in her favor.—*Brown v. French*, 148 Ala. 272, 42 South. 409.

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The only material difference between the evidence introduced in the case on the former trial and that introduced on the trial now appealed from is that in this trial the defendant, over the objection of the plaintiff, introduced testimony tending to show that the plaintiff consented to the removal of the fence. In order to bring the case into the circuit court, the defendant made the oath required by the statute, stating that "the defendant entered * * * peaceably, * * * and not under claim of any agreement, contract, or understanding with the plaintiff," etc. Without said affidavit, the case could not have been brought into the circuit court. It is a familiar statement of the law of estoppel that "a party who has, with knowledge of the facts, assumed a particular position in judicial proceedings, is estopped to assume a position inconsistent therewith, to the prejudice of the adverse party."—16 Cyc. 796; *Taylor et al. v. Crook, Adm'r*, 136 Ala. 356, 378, 34 South. 905, 96 Am. St. Rep. 26; *Eldridge v. Grice*, 132 Ala. 667, 668, 32 South. 683; *Schamagel v. Whitehurst*, 103 Ala. 260, 263, 15 South. 611; *Hodges v. Winston*, 95 Ala. 514, 517, 11 South. 200, 36 Am. St. Rep. 241; *Hill's Adm'r, v. Huckabec's Adm'r*, 70 Ala. 184, 188; *Boyet v. Standard C. & O. Co.*, 146 Ala. 554, 557, 41 South. 756; *Railway Co. v. McCarthy*, 96 U. S. 267, 24 L. Ed. 693.

In addition to this, the statute itself provides that in such cases the plaintiff must recover on the strength of his legal title, as in statutory ejectment, "unless he can prove that the defendant, or those under whom he claims, entered on said lands under some contract, or agreement between the plaintiff, or those under whom he claimed, or by use of force, in which latter case no inquiry can be had as to the respective strength of the legal title of the plaintiff or defendant."—Code 1896, § 2149, Code 1907, § 4285. So, under the first proposition above stated, the defendant should not have been allowed to introduce testi-

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mony in contradiction of the affidavit upon which he had brought his case into the circuit court, and without it the case stands just as it was when here before, and under the former decision in this case the plaintiff was entitled to the general charge in her behalf.

The appellee suggests that this clause refers only to entries by tenants, under an agreement of renting, etc., and does not cover a case where a party entered by acquiescence. We cannot interpolate into the statute anything beyond its actual language. The affidavit is required to state that affiant did not enter "under claim of any agreement, contract or understanding with the plaintiff," which is certainly broad enough to cover an acquiescence by the plaintiff. We might say, on the other hand, that the statute was intended to cover those cases only where the plaintiff's possession was not apparent, and the defendant entered and took possession peaceably, in good faith. But, however that may be, it is safer to follow the language of the statute, rather than travel into the field of speculation, outside its words, to ascertain what the intent of the Legislature was.

Even if we could forego this proposition, this court held, in this case, that the tenant must bear fealty to his landlord, and cannot make a valid attornment to another; nor, necessarily, could the tenant, by a mere acquiescence, authorize another to violate the possession which he holds for the landlord, but could regain the possession. If she could regain the possession, she could do so by action, as could the landlord, suing in her name, and, her permission being invalid, the entry was forcible under our decisions.—*Mallon v. Moog*, 121 Ala. 304, 306, 307, 25 South. 583.

Again, under the plain wording of the statute, even if the acquiescence of the plaintiff were valid, and could constitute an entry by agreement, no evidence could be

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introduced to show title in the defendant.—*Fearn et al. v. Beirne*, 129 Ala. 435, 440, 441, 29 South. 558. It would follow that the court erred in admitting proof of title, as it did also in admitting proof of the character of house which the plaintiff kept; such matters being irrelevant to the issues in this case.

The court also erred in permitting proof tending to question the authority of the attorney to bring this suit. This is not a part of the defense of the case, but a matter collateral to the merits of the case. The attorney being an officer of the court, his authority is presumed; but, if questioned, the proper course is to make a motion, in order that that matter may be determined by the presiding judge, and not mingled with the merits of the case before the jury.—Code 1907, § 2990; 4 Cyc. 930, 931; *Indiana, B. & W. Ry. Co. v. Maddy*, 103 Ind. 200, 2 N. E. 574; 2 Ency. Pl. & Pr. 680.

The judgment of the court is reversed, and the cause remanded.

DOWDELL, C. J., and DENSON and MAYFIELD, JJ., concur.

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Detinue.

(Decided Feb. 11, 1909. 48 South. 812.)

Detinue; Judgment; Sufficiency.—A judgment entry in detinue which fails to assess separately each article sued for, or which fails to assess the value of the property, or its alternate value, is not in compliance with section 3781, Code 1907, and is insufficient.

APPEAL from Houston Circuit Court.

Heard before Hon. H. A. PEARCE.

[Jernigan v. Willoughby.]

Detinue by Sidney Willoughby against J. B. Jernigan. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Willoughby sued Jernigan in detinue for a boiler, engine, and all attachments, known as the "Pennington mill property," with the value of the hire or use thereof. Jernigan gave a replevy bond for the property sued for. Suggestion was made that the property was claimed under and by virtue of a mortgage, and that the amount of the mortgage debt be ascertained. The judgment entry, omitting unnecessary parts, is as follows: "We, the jury, find for the plaintiff for the property sued for, to wit, one boiler and engine, known as the 'Pennington mill property.' We further find the amount due on the mortgage to the plaintiff in this case is \$338.53." The judgment entry follows the verdict.

ESPY & FARMER, for appellant. The judgment should have been for the recovery of the property sued for or its alternate value.—*Witticks v. Keiffer*, 31 Ala. 199; *Robinson v. Richards*, 45 Ala. 358; *Auerbach v. Blackman*, 57 Ala. 616; *Lasseter v. Thompson*, 85 Ala. 221. The jury failed by their verdict to ascertain the value of the property.—Secs. 3781, 3783 and 3789, Code of 1907; *Jones v. Anderson*, 76 Ala. 427; *Townsend v. Brooks*, 76 Ala. 308; *Tate v. Murphy*, 80 Ala. 440; *Savage v. Russell*, 84 Ala. 103; *Southern Warehouse Co. v. Johnson*, 85 Ala. 178.

CRAWFORD & BYRD, for appellee. No brief came to the Reporter.

ANDERSON, J.—In an action of detinue, the statute (section 3781, Code 1907,) requires that the value of each article of the property sued for should

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be assessed by the jury separately, if practicable, and that judgment against either party must be for the property sued for or its alternate value, etc. The judgment entry fails to recite or show a compliance with the law, as the value of the property was not assessed, nor is there any judgment for the alternate value.—*Witticks v. Keifer*, 31 Ala. 199; *Lassiter v. Thompson*, 85 Ala. 223, 6 South. 33; *Warehouse Co. v. Johnson*, 85 Ala. 178, 4 South. 643.

The judgment of the circuit court is reversed, and the cause is remanded.

Reversed and remanded.

DOWDELL, C. J., and McCLELLAN and MAYFIELD, JJ., concur.

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Detinue.

(Decided April 15, 1909. 49 South. 309.)

1. *Bill of Exceptions: Signing; Time.*—Where a bill of exceptions was signed on June 11, and signed by the trial judge, and recited that it was tendered and approved on June 9, and the trial judge certified that it was filed and approved within the time allowed by the court's order, it will be presumed on appeal that it was signed on the day it was filed, and that day being within the time fixed by the order of the court, the bill will not be stricken.

2. *Justices of the Peace; Appeal From; Proceeding; Objection; Time.*—Where defendant appealed to a jury from a judgment of the justice of the peace, and the plaintiff took part in the trial before the jury without objecting to the appeal because no bond was given as required by the statute, plaintiff cannot raise that objection for the first time in the court to which defendant appeals from the judgment in the jury trial since the proceedings are otherwise regular and appeals from justice's judgment are triable de novo. (Sec. 488, Code 1896.)

APPEAL from Clay County Court.

Heard before Hon. W. J. PEARCE.

[Crabtree, et al. v. Nolan.]

Detinue by I. D. Nolan against James E. Crabtree and others. On appeal from a jury trial in the justice court to the county court taken by the defendant, the plaintiffs move to dismiss because defendants fail to give bond as required by the statute, on an appeal to a jury trial in the justice court. The court dismissed the appeal from which judgment defendant brings this appeal. Reversed and remanded.

JOHN A. DARDEN, and CORNELIUS & GAY, for appellant. The trial court erred in granting plaintiff's, appellee's, motion to dismiss the appeal of defendants from judgment in justice court.—*Burns v. Henry*, 67 Ala. 209; *Glaze v. Blake*, 56 Ala. 379; *L. & N. R. R. Co. v. Barker*, 96 Ala. 435; *Davis Wagon Co. v. Cannon*, 129 Ala. 301; *Clem v. Wise*, 133 Ala. 408. The trial court erred in dismissing defendants' appeal from justice court.—Authorities supra; *Western Railway v. Lazzarus*, 88 Ala. 458; Code 1907, § 4720; Code 1896, § 488; 114 Ala. 673; *Thompson v. Lea*, 28 Ala. 453. Trial court erred in granting motion of plaintiff to dismiss defendants' appeal from judgment of justice of the peace upon the verdict of a jury in justice of the peace court.—Authorities supra; *Walton v. Parker*, 114 Ala. 673. Trial court erred in rendering judgment on plaintiff's motion to dismiss appeal of defendants.—Authorities, supra. Trial court erred in sustaining motion of plaintiff to dismiss defendants' appeal.—Authorities, supra; *Walton v. Parker*, 114 Ala. 673; *Burnes v. Henry*, 67 Ala. 209.

WHATLEY & CORNELIUS for appellee. It was the duty of the county court to dismiss the appeal ex meru motu.—3 Mayf. 1196; *Wyatt v. Judge*, 7 Port. 39; *Merrill v. Jones*, 8 Port. 556; *Fields v. Walker*, 23 Ala. 167; *Wrightman v. Karsner*, 20 Ala. 446; *Wyly v. The State*, 117 Ala. 158; *Beech v. Lavender*, 138 Ala. 409.

[Crabtree, et al. v. Nolan.]

DENSON, J.—This cause was tried on April 15, 1908, and the record shows that an order was entered allowing defendants 60 days from that date within which to tender and have signed a bill of exceptions. The conclusion of the bill is as follows: "Tendered and approved this 9th day of June, 1908, by Hon. W. J. Pearce, judge presiding; and I certify that the bill of exceptions was filed and approved in the time allowed by the order of the court entered April 15, 1908, (Signed) W. J. Pearce, Judge of the County Court of Clay." The judgment entry shows the order referred to, and the bill was filed June 11, 1908, as shown by the indorsement of the clerk. While the bill may not show with directness the date on which the judge's official signature was subscribed thereto, yet the presumption must be indulged that it was signed on the day of its filing, and, that day being within the time fixed by the order, it must be held that the motion to strike the bill is without merit.—*Kitchen v. Moye*, 17 Ala. 143; *Id.* 17 Ala. 394; *Dorsey's Case*, (Ala.) 39 South, 584.

The cause originated in a justice court, and from a judgment there rendered in favor of the plaintiff the defendants prayed an appeal to a jury. The jury was impaneled by the justice on the day fixed for the hearing, whereupon trial was had, and from a judgment rendered by the justice on the verdict of the jury in favor of the plaintiff the defendants carried the case by appeal to the county court. In that court the plaintiff's motion to dismiss the appeal was granted, and it is from the judgment dismissing the appeal that the defendants have taken an appeal to this court. The ground for the motion was that defendants' appeal from the justice's judgment to the jury was taken and granted without bond being first given as required by section 2687 of the Code of 1896. Upon this it is insisted that the judg-

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ment rendered by the justice on the verdict of the jury was void, for want of jurisdiction in that official to submit the case to the jury, and would not support an appeal.

The record shows regularity in all other respects in the proceedings in the justice court. The record also shows that the plaintiff appeared, and entered into trial before the jury, without raising any point in respect to lack of a bond. In short, this question was first presented in the county court. If came too late and the county court erred in sustaining the motion.—Code 1896, § 488; *Glaze v. Blake*, 56 Ala. 379; *L. & N. R. R. Co. v. Barker*, 96 Ala. 436, 11 South. 453; *Western Railway, etc., v. Lazarus*, 88 Ala. 458, 6 South. 877; *Walton v. Parker*, 114 Ala. 673, 21 South. 826. The authorities cited by appellee are not in point.

Reversed and remanded.

DOWDELL, C. J., and SIMPSON and MAYFIELD, JJ., concur.

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Detinue.

(Decided Feb. 6, 1909. Rehearing denied April 4, 1909.
49 South. 71.)

1. *Pleading; Time of Filing; Abatement.*—After trial and appeal from judgment in the justice court, a plea to the jurisdiction of that court came too late.

2. *Same; Pleading; In Short by Consent.*—Pleading in short by consent in the justice court should contain at least a suggestion or skeleton of the nature of the defense, else on appeal to another court that court would not be informed of the defenses.

3. *Appeal and Error; Necessity of Showing Error.*—Error is not presumed on appeal, but the burden is on the appellant to show error in the record.

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4. *Justice of the Peace; Record; Pleading*.—A recital in the judgment by the justice court in the transcript "that this day came the parties and the defendant pleaded in short by consent and has leave to offer any facts in evidence which may be specially pleaded" is not sufficient to warrant the assumption that pleas to the jurisdiction of the justice court were embraced in the general leave and consent to plead in short; and to justify the circuit court in ignoring a plea in abatement to the jurisdiction of the justice it need not be denied that such matter in abatement might have been shown under the indefinite leave appearing in the recital.

5. *Estoppel; Necessity of Pleading*.—While at common law estoppel in pais need not have been pleaded, under our statute (Sec. 3295, Code 1907) it is necessary that it be specially pleaded; and hence, the fact that plaintiff's attorney with ample authority silently permitted the sale of the horse in question and its purchase by the defendant for valuable consideration, such attorney being present at the sale, should be specially pleaded in an action in detinue.

6. *Chattel Mortgages; Sales*.—The evidence in this case examined and held not to show title in the animal under a claim of title by a purchaser at mortgage foreclosure sale.

7. *Same; Title of Purchaser*.—The purchaser of property at a foreclosure sale of a chattel mortgage must show a valid mortgage from one having title.

8. *Detinue; Prior Possession; Recovery*.—A plaintiff showing prior possession recovers in detinue against a wrong doer.

9. *Witnesses; Cross Examination*.—In an action of detinue for a horse, a witness who had testified that he traded the horse to plaintiff a year or two before should not be permitted to be asked on cross examination whether it was plaintiff's horse or plaintiff's father's horse for which he swapped, since the inquiry was in reference to title to a different horse from that involved in the suit. (Tyson, C. J., dissenting.)

APPEAL from Coosa Circuit Court.

Heard before Hon. S. L. BREWER.

Action of detinue by Joe Williams against R. W. Blair, for the recovery of a horse. Begun in the justice court and carried by appeal to the circuit court. From a judgment for plaintiff defendant appeals. Affirmed.

D. H. RIDDLE, for appellant. Having agreed to plead in short by consent in the justice court the appellee cannot complain of its agreement in the circuit court.—*Strauss v. Mertief*, 64 Ala. 311; *Gayle v. Randle*, 4 Port. 233. Where the justice court has no jurisdiction, the circuit court has none on appeal.—*Pruitt v. Stewart*, 5 Ala.

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112; *R. & D. R. R. Co. v. Hutto*, 102 Ala. 575. The defendant can avail himself of want of jurisdiction in the justice court by plea in abatement in the circuit court.—*Vaughan v. Robinson*, 20 Ala. 229. Any kind of an objection to the jurisdiction of the justice of the peace is sufficient.—*L. & N. v. Barker*, 96 Ala. 434; *Knowles v. Stecd*, 76 Ala. 427. The defendant could show an outstanding title without even connecting himself with it.—3 Mayf. Sec. 12. If a person suffers his property to be sold to a third person and stands by and fails to assert his title, he is estopped from afterwards setting it up.—*Traum v. Keiffer & Wife*, 31 Ala. 136; 3 Mayf. 427, sec. 387; 43 Ala. 561; *Formby v. Hood*, 119 Ala. 231; *Herzberg v. Hollins*, 119 Ala. 496; *Ashurst v. Ashurst*, 119 Ala. 219; *Thompson v. Sanborn*, 35 Am. Dec. 490.

LACKEY & BRIDGES, for appellee. If the subject matter of a suit in a Justice of the Peace court be in excess of the amount of the jurisdiction of the court, and no objection is raised thereto in the Justice court, and the cause proceeds to trial without objection, an objection on that ground cannot be interposed in the Circuit court on appeal to that court.—*R. & D. R. R. Co. v. Thomas*, 102 Ala. 575.

When special pleas are agreed to be taken in short by consent, it can only be understood by the court, that matters of form are waived. The plea must contain substance, or what if admitted, will make out a case for the party pleading.—*Gayle v. Randall*, 4 Por. 232; *Steele v. Walker*, 115 Ala. 485. An estoppel as a defense at law or in equity, must be specially pleaded to be available.—*Banks v. Leland*, 122 Ala. 289; *Jones v. Peebles*, 130 Ala. 564; 10 Enc. of Pl. & Pr. P. P. 13-14; 16 Cyc. 806. A party claiming an estoppel must have been injured thereby, or have incurred liability, or his position must be

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changed on account thereof.—*Watson v. Knight*, 44 Ala. 352; *Planter Co. v. Selma Bank*, 63 Ala. 595; *Sanders v. Robertson*, 57 Ala. 465.

McCLELLAN, J.—Detinue for a horse, begun in a justices's court and brought to the circuit court by Blair, the defendant, appellant here. The transcript from the justice's court recites that: "This day came the parties, and the defendant pleaded in short by consent, and has leave to offer in evidence any facts that may be specially pleaded, and issue being joined thereon. * * *" There is, of course, nothing in the transcript from the justice's court to indicate what was, in fact, offered in defense of the action—its character or purport. When the cause reached the circuit court on appeal, the defendant sought to plead in abatement to the jurisdiction of the justice's court. These pleas came too late (*L. & N. R. Co. v. Barker*, 96 Ala. 435, 11 South. 453, and authorities therein cited), unless the recital quoted warrants the assumption, contended for by appellant, that such pleas were embraced in the general leave and consent to plead in short. It is extremely doubtful whether the quoted recital, in reference to the pleading before the justice, shows such a proceeding as to rise to the dignity of pleading in short by consent.—16 Ency. Pl. & Pr. p. 559 et seq., and notes. From the recital not even the nature of the plea or matter of defense is stated. Generally such short pleading by consent contains at least a suggestion of the nature of the defense, a skeleton, the formal ample statement of which only is waived by the pleading in short, by consent; else another court would be, as we are here, wholly uninformed as to what was the defense interposed.—*Steele v. Walker*, 115 Ala. 485, 21 South. 942, 67 Am. St. Rep. 62. As indicated to hold that the pleas

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in abatement presented in this case after its removal to the circuit court, were in time, had not been waived, is to affirm that the matter in abatement, going to the jurisdiction of the justice in the premises, was brought to the attention of the primary court. In this court a complainant must show error on the record. He can only do so in this instance by an assumption without any support in the record. That such matter in abatement might have been shown under the indefinite leave appearing in the quoted recital need not be denied, in order to justify the circuit court in ignoring such matter in abatement for the reason that the appellant's obligation, if he would put the circuit court in error, is to show by the record that he in fact in the justice's court presented the matter in abatement he later undertook to assert in the circuit court. That court committed no error in its treatment of the pleas in abatement, or motion to like effect.

An estoppel was sought to be invoked, in the evidence only, by the defendant, predicated upon the asserted fact that the attorney for the plaintiff, with ample authority in the premises, silently premitted, while present, the sale of the horse in question and its purchase by defendant for a valuable consideration. Such a defense must be specially pleaded, as was not done in this instance. As a matter of authority, this court, in *Jones v. Peebles*, 130 Ala. 269, 273, 30 South. 564, so determined the question. Therein it was said: "And we do not see how it can be held otherwise, in cases at law, whether the defense relied upon be an estoppel by record, by deed, or in pais, in view of the plain mandate of the statute, if he (the defendant) does not rely solely on a denial of the plaintiff's cause of action, he must plead specially the matter of defense."—Code 1907, § 3205. In detinue, no more than in any other action at law, can it be said that the statute, quoted in *Jones v. Peebles*, had no ef-

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fect upon the common-law rules of pleading. At common law an estoppel in pais need not have been pleaded.—Bigelow's Estoppel, p. 585. Under the letter of our statute, however, the inquiry is, in all cases, whether matter asserted in defense is special in the sense that it is not comprehended in the issue made by a general traverse of the allegations of the declaration. That the estoppel attempted to be here availed of, in the testimony only, was special matter of defense, is apparent, because it goes, not to the title of the plaintiff to the chattel, nor to his right to the possession, but involves conduct on his part that affects, not to deny his right to the thing itself, but to foreclose his right to assert the truth in the premises, viz., that the property, and right of immediate possession thereof, were with him, the plaintiff. It has been often held here that, in detinue, the statute of limitations is available in defense under the general issue; but that is because, as said in *Lay v. Lawson*, 23 Ala. 392, "the statute of limitations acts upon the title of personal property, and not only bars the remedy, but destroys the right." Estoppel in pais, as here involved, has no such fundamental effect. It is true some of our decisions affirm that the general issue in detinue puts in issue the right of the plaintiff to recover; but this declaration is necessarily short of a ruling, in effect, that the general issue is the only serviceable plea in detinue. Our Reports contain many cases where it seems to have been assumed by litigants and courts that special matters of defense should be specially pleaded, thus negating any idea that the general issue puts in issue every possible obstacle to a recovery by the plaintiff. This is notably true in respect of actions of detinue, where justification under process was pleaded. Additional to the reliance placed upon the holding in *Jones v. Peebles*, *supra*, sound reason and the scores of authorities noted in 16 Cyc. p. 806 et seq., dem-

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onstrate, we think, the correstness of the view so expressed in *Jones v. Peebles*. Of course, if matter of estoppel in pais should have been specially pleaded, and was not, the result was a waiver thereof.—8 Ency. Pl. & Pr. pp. 13, 14.

The plaintiff presented testimony tending to show prior possession of the horse and also title thereto derived from A. J. Williams, plaintiff's father. The defendant's defense seems to have been that one Penton had a mortgage, executed by A. J. Williams, to him on the horse here in suit, and that this mortgage was foreclosed by a sale at public outcry, at which defendant became the purchaser for value of the horse. There was no proof tending to show when such alleged mortgage was given to Penton, whether before the horse became plaintiff's or not; whether, at the time the alleged mortgage was given to Penton by A. J. Williams, A. J. Williams owned or had possession of the horse or not. In other words, the proposition is that on testimony of the mere existence, without reference to any date or period, and without offering in evidence the instrument, of a mortgage on a horse in controversy, executed by a third party, a sale in foreclosure of the mortgage, and purchase thereat by the defendant, such purchaser may defeat a plaintiff in detinue who shows prior possession of the animal. Obviously, no right, title, or interest in or to the animal is shown by such testimony. It may be assumed to be true, and yet the alleged purchaser be a trespasser without semblance of right to the possession of or title to the property; and a wrongdoer must always fail in detinue by a plaintiff showing prior possession. If a purchaser at a mortgage sale would clothe himself with a measure of right, in title or possession, to the chattel involved, he should show a valid mortgage by one having title to

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the chattel mortgaged. A mortgage given by one without right to or title in the property is, of course a nullity.

During the cross-examination of the witness Martin, counsel for the defendant stated to the court that A. J. Williams had given a mortgage to Penton on the horse in suit, that the horse had been sold under the mortgage, and that defendant bought the horse at the sale for a valuable consideration and without notice of another suit for the horse pending between Penton and the plaintiff. The court was not invited to make, and did not make, any ruling or reference to this statement. Thereupon counsel for defendant propounded to the witness Martin, who, it had been shown, traded the horse in suit to plaintiff a year or more before the institution of this suit, this question: "Do you know whether it was Joe's [plaintiff's] horse or his father's (A. J. Williams') horse that was swapped to you for the horse involved in this suit?" The court sustained an objection to the question. The objection was properly sustained, on the ground, if not otherwise, that the title to a different horse from that involved in this suit was inquired about.

We discover no error in the record, and the judgment is affirmed.

Affirmed.

HARALSON, DOWDELL, and SIMPSON, JJ., concur. ANDERSON and DENSON, JJ., concur in the conclusion. TYSON, C. J., dissents.

[Richards v. Shepherd.]

Richards v. Shepherd.*Detinue.*

(Decided April 20, 1909. 49 South. 251.)

1. *Estoppel; General Estoppel; Nature; Disclaimer.*—Where one, by his statements as to matters of fact, or as to his intended abandonment of existing rights, designedly induces another to change his conduct, or alter his condition in reliance thereon, he is estopped from denying the truth of his statement or from enforcing his right against his declared intention of abandonment.

2. *Same; Acts Constituting.*—Where iron railing for use in a building had been delivered to the contractor, and the contractor abandoned the work after the delivery of the railing, and while indebted to the seller for them, and the cost of the railing had been included in an estimate of materials furnished and paid by the owner to the seller, and charged to the contractor's account with the seller's consent, and the seller subsequently took the railings from the premises of the owner with the distinct understanding that they were to be returned and put on the building, the owner of the premises having claimed the railing as his property, the seller was estopped from denying the owner's right of possession, and from asserting his own right.

3. *Principal and Agent; Authority of Agent.*—Where the evidence tended to show that the seller of materials to a contractor sought to remove the same from the owner's premises, but the owner claimed the property and refused to permit the removal unless they were to be returned, and subsequently in a telephone conversation between the owner and the foreman of the seller, the foreman promised to repair the material, return them and put them on the building, the jury were authorized to find that the foreman had the authority to act for the seller, especially where the seller subsequently acknowledged the foreman's authority.

APPEAL from Jefferson Circuit Court.

Heard before Hon. A. A. COLEMAN.

Detinue by Everett Shepherd against Joseph Richards, doing business as the Richards Iron Works, for certain iron railings. Judgment for plaintiff and defendant appeals. Affirmed.

GREGG & BURROW, for appellant. Under the evidence in this case, plaintiff was not entitled to recover in detinue.—*Reese v. Harris*, 27 Ala. 301; *Seals v. Edmundson*,

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73 Ala. 295. Under the facts in this case, the defendant could show title in a third person to defeat recovery without connecting himself therewith.—*Foster v. Chamberlain & Co.*, 41 Ala. 158; *Miller v. Jones*, 26 Ala. 247; s. c. 29 Ala. 174; *McCurry v. Hooper*, 12 Ala. 828. On these authorities, the court erred in giving charges 4 and 5. The court erred in refusing to give charges 4, 8 and 9 requested by the defendant.—*McFadden Bros. v. Henderson*, 128 Ala. 231; *Foley v. Felrath*, 98 Ala. 176; 24 A. & E. Ency of Law, 1049; 11 N. Y. 35; 99 Mass. 397; 81 Pa. St. 18; 106 U. S. 505.

C. B. POWELL, for appellee. The property was delivered to Shepherd and he paid for it, so Carson never had the title and Richards did not retain title.—*Morningstar v. Patton*, 21 Ala. 437; *L. & N. R. R. Co. v. Walker*, 30 South. 738; *Shows v. Brantley*, 28 South. 716. The plaintiff under all the evidence is entitled to the affirmative charge, and if error was committed it was without injury.—*Mizell v. Southern Ry. Co.*, 132 Ala. 504; *L. & N. v. York*, 30 South. 676.

SAYRE, J.—This was a statutory action of detinue for the recovery of two iron balcony railings. The facts, which were proven without dispute, may be fairly epitomized as follows: Plaintiff (appellee) contracted with one Carson for the addition of an upper story to his storehouse. Carson was to furnish the materials and do the work at a fixed price. The defendant agreed with Carson to furnish the iron work, including four balcony rails, of which those sued for were two. The railings were delivered upon the sidewalk adjacent to the storehouse. Carson subsequently abandoned the uncompleted work while indebted to the defendant, and it was completed by the plaintiff. There had been a controver-

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sy between Carson and defendant as to whether the defendant had agreed to attach the railings to the building. The cost of the railings had been included in an estimate of materials furnished, which plaintiff had paid to defendant, and had been charged to Carson's account with Carson's consent. Defendant afterwards agreed with plaintiff to put the railings in place on the building for a compensation of \$5 each, to be paid by plaintiff, and did so put two of them. The two in suit had become bent or wraped while lying upon the sidewalk. The defendant sent a man and wagon for the bent railings. Plaintiff met the man on the sidewalk, and objected to their removal on the ground that they were his property, and informed the man that he could not have them without an understanding that they were to be straightened, returned, and put in place. Thereupon a conversation by telephone ensued between plaintiff and the foreman at defendant's shop, in which plaintiff reiterated his claim and purpose. The foreman answered that defendant had instructed him to send for the railings, repair them, return them, and put them on the house. Plaintiff demanded a distinct understanding that the rails were to be returned and put up. The foreman agreed. Subsequently defendant admitted to plaintiff that he had gotten the railings on a promise to return them, and that he had to do so in order to get possession of them, and that they were still in his possession.

"An estoppel is where a man is concluded by his own act or acceptance to say the truth."—*Edmondson v. Montague*, 14 Ala. 370. Where a party, by his statements as to matters of fact or as to his intended abandonment of existing rights, designedly induces another to change his conduct or alter his condition in reliance upon them, he cannot be permitted to deny the truth of his statements, or enforce his rights against his declared inten-

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tion of abandonment.—*Insurance Co. v. Mowry*, 96 U. S. 544, 24 L. Ed. 674. The delivery of the railings had vested title in Carson. It may be conceded that the title remained in him so that the result of the suit depended upon a bare first possession. But plaintiff's claim to the property was equal in dignity and legal sanction to the defendant's. Plaintiff was in a position to dispute the possession on terms of equality, to say the least. When the defendant induced plaintiff to surrender his asserted right of possession on a promise to return the railings, so that plaintiff placed himself in a position distinctly less advantageous to his claim of right in the property, he was, on the principle announced, thereafter estopped to deny plaintiff's right of possession or to assert his own.

The objection to the conversation over the telephone was not well taken as for any lack of authority of the foreman to speak for the defendant. The bill of exceptions shows that he was the foreman of the defendant's shop, and the jury from that might well infer his authority. Moreover, the defendant subsequently acknowledged the foreman's authority to promise, when he admitted that he had gotten the railings on the promise; the foreman along having voiced the promise.

The court might well have given the general affirmative charge for the plaintiff. The other charge need not, therefore, be considered.

Affirmed.

DOWDELL, C. J., and ANDERSON and McCLELLAN, JJ., concur.

MEMORANDA OF CASES DECIDED DURING THE
PERIOD EMBRACED IN THIS VOLUME,
WHICH ARE ORDERED NOT TO
BE REPORTED IN FULL.

BEMISH & MEYER V. L. & N. R. R. CO.

(Decided Feb. 11, 1909.)

APPEAL from Selma City Court.

Heard before Hon. J. W. MABRY.

A. D. PITTS, for appellant. MALLORY & MALLORY, for appellee.

Per curiam. Appeal dismissed by appellant.

CALDWELL V. THE STATE.

Habeas Corpus.

(Decided Jan. 18, 1909.)

APPEAL from Perry Probate Court.

Heard before Hon. J. B. SHIVERS.

W. F. HOGUE, for appellant. ALEXANDER M. GARBER, Attorney General, for the State.

DOWDELL, J.—It is ordered that the petitioner be allowed bail. And the cause is accordingly reversed, rendered and remanded.

HARALSON, SIMPSON and DENSON, JJ., concur.

DRISCOLL V. THE STATE.

Carrying Concealed Weapons.

(Decided April 15, 1909.)

APPEAL from Macon County Court.

Heard before Hon. M. B. ABERCROMBIE.

O. S. LEWIS, for appellant. ALEXANDER M. GARBER, Attorney General, for the State.

Per curiam. Errors confessed and defendant discharged.

FABIN V. THE STATE.

(Decided Feb. 11, 1909.)

APPEAL from Covington Circuit Court.

Heard before Hon. H. A. PEARCE.

No counsel marked for appellant. ALEXANDER M. GABER, Attorney General, for the State.

Per curiam. Abated by death of appellant.

FARNHAM V. DEAN, JUDGE.

(Decided May 13, 1909.)

APPEAL from Conecuh Chancery Court.

Heard before Hon. L. D. GARDNER.

J. F. JONES, for appellant. RABB & PAIGE, for appellee.

Per curiam. Appeal dismissed on motion of appellant.

FOSTER, ET. AL. V. REDDICK.

Ejectment.

(Decided Jan. 21, 1909. Rehearing denied Feb. 5, 1909. 48 So. 666.)

APPEAL from Bullock Circuit Court.

Heard before Hon. A. A. EVANS.

J. D. NORMAN, for appellants. D. S. BETHUNE, and E. L. BLUE, for appellee.

DOWDELL, J.—Reversed and remanded on the authority of *Foster, et al. v. Carlisle, et al.*, 159 Ala. 621, 48 South. 665.

TYSON, C. J., and ANDERSON and MCCLELLAN, JJ., concur.

GIBSON V. WESTERN U. TEL. CO.

(Decided Feb. 4, 1909.)

APPEAL from Autauga Circuit Court.

Heard before Hon. W. W. PEARSON.

BALLARD & THOMAS, for appellant. RUSHTON & COLEMAN, for appellee.

DOWDELL, J.—Plaintiff was entitled to recover only the price paid for sending the telegram. Affirmed.

HARALSON, SIMPSON and DENSON, JJ., concur.

GRIFFIN V. COLLIER.

(Decided April 22, 1909.)

APPEAL from Tallapoosa Circuit Court.

Heard before Hon. S. L. BREWER.

No counsel marked for either party.

Per curiam. Affirmed on certificate for want of transcript.

GULF COMPRESS CO. V. SYKES-TWEEDY & CO.

(Decided June 30, 1908. Rehearing denied Feb. 5, 1909.)

APPEAL from Morgan Chancery Court.

Heard before Hon. W. H. SIMPSON.

BROWN & KYLE, FITZHUGH, BIGGS & FITZHUGH, and CABANISS & BOWIE, for appellant. E. W. GODBEY, and CALLAHAN & HARRIS, for appellee.

McCLELLAN, J.—Reversed and rendered on the authority of *Gulf Compress Co. v. Harris Cortner & Co.*, 158 Ala. 343; 48 South. 477.

TYSON, C. J., HARALSON, DOWDELL, SIMPSON, ANDERSON and DENSON, JJ., concur.

McCLELLAN, J., dissents.

GULF COMPRESS CO. V. JONES COTTON CO.

(Decided June 30, 1908. Rehearing denied Feb. 5, 1909.)

APPEAL from Morgan Chancery Court.

Heard before Hon. W. H. SIMPSON.

BROWN & KYLE, FITZHUGH, BIGGS & FITZHUGH, and CABANISS & BOWIE, for appellant. E. W. GODBEY, and CALLAHAN & HARRIS, for appellee.

ANDERSON, J.—Reversed and rendered on the authority of *Gulf Compress Co. v. Harris Cortner & Co.*, 158 Ala. 343; 48 South. 477.

TYSON, C. J., HARALSON, DOWDELL, SIMPSON and DENSON, JJ., concur.

McCLELLAN, J.—dissents.

HALL V. TEMPLE.

(Decided April 15, 1909.)

APPEAL from Elmore City Court.

Heard before Hon. W. W. PEARSON.

FRANK W. LULL, for appellant. J. M. HOLLEY, for appellee.

Per curiam. Appeal dismissed for want of prosecution.

HARRIS V. McNEILL.

(Decided April 22, 1909.)

APPEAL from Fayette Circuit Court.

Heard before Hon. S. H. SPROTT.

No counsel marked for either party.

Per curiam. Affirmed on certificate for want of transcript.

HENRY V. BRANNAN.

(Decided April 8, 1909.)

APPEAL from Mobile Circuit Court.

Heard before Hon. SAMUEL B. BROWNE.

ERWIN & MCALEER, for appellant. MCINTOSH & RICH,
for appellee.DOWDELL, C. J.—The court properly granted a motion
for new trial. Affirmed.

SIMPSON, DENSON and MAYFIELD, JJ., concur.

MOBILE & OHIO R. R. CO. V. GLOVER.

(Decided April 8, 1909.)

APPEAL from Mobile Circuit Court.

Heard before Hon. SAMUEL B. BROWNE.

S. R. PRICE and C. M. WRIGHT, for appellant. ERWIN
& MCALEER, for appellee.DOWDELL, C. J.—Affirmed on authority of former ap-
peal, 150 Ala. 386; 43 South. 719.

SIMPSON, DENSON and MAYFIELD, JJ., concur.

MONTGOMERY TRACTION CO. V. PARK.

Damages for Injury to Minor Child.

(Decided Feb. 9, 1909.)

APPEAL from Montgomery City Court.

Heard before Hon. A. D. SAYRE.

RUSHTON & COLEMAN, for appellant. HILL, HILL &
WHITING, for appellee.MAYFIELD, J.—Affirmed for want of assignment or er-
ror.DOWDELL, C. J., ANDERSON and MCCLELLAN, JJ., con-
cur.

NORRIS, ET AL. V. NORRIS.

(Decided Feb. 9, 1909.)

APPEAL from Selma City Court.

Heard before Hon. J. W. MABRY.

PETTUS, JEFFRIES & PETTUS, for appellant. **DANIEL PARTRIDGE, JR.**, for appellee.

Per curiam. Appeal dismissed.

SLOCUM V. THE STATE, EX REL. LOMBARD.

(Decided April 8, 1909.)

APPEAL from Baldwin Circuit Court.

Heard before Hon. SAMUEL B. BROWNE.

FRANK S. STONE, and **WEBB & MCALPINE**, for appellant. **JOHN E. MITCHELL** and **LESLIE HALL**, for appellee.

Per curiam. Errors confessed and cause reversed and remanded.

SLOSS-SHEFFIELD S. & I. CO. V. SUBURBAN REALTY & I. CO.

(Decided April 7, 1909.)

APPEAL from Jefferson Circuit Court.

Heard before Hon. A. O. LANE.

TILLMAN, GRUBB, BRADLEY & MORROW, for appellant. **GEORGE HUDDLESTON**, for appellee.

Per curiam. Dismissed by agreement of parties.

TOWN OF FAYETTE V. WALTERS.

(Decided April 22, 1909.)

APPEAL from Fayette Circuit Court.

Heard before Hon. S. H. SPROTT.

No counsel marked for either party.

Per curiam. Affirmed on certificate for want of transcript.

SUBJECT INDEX.

ACCORD AND SATISFACTION.

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(b) Favorable to Appellant.

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Same; Presumption.—Where the bill of exceptions does not purport to set out all the evidence in the case, in support of the court's action in giving the general charge, the presumption will be indulged on appeal that the evidence was undisputed.—*Gambill v. Cooper*, 637.

Appeal and Error; Necessity of Showing Error.—Error is not presumed on appeal, but the burden is on the appellant to show error in the record.—*Blair v. Williams*, 655.

(d) Erroneous Charges.

Appeal and Error; Erroneous Charges; Reversal.—A cause will be reversed and remanded where a charge is given erroneously limiting the effect of evidence, where this court cannot know from the record the effect of such charge.—*L. & N. R. R. Co. v. Price*, 213.

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(e) Necessity for Ruling.

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—Where the trial court did not rule on objection to the testimony of a physician that he did not consider plaintiff responsible but stated that the witness might give his professional opinion as to whether she was irrational, to which the defendants attorney excepted, does not present for review on appeal the objection interposed to the testimony.—*City of Mtg. v. Shirley*, 239.

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3. Harmless Error.

Appeal and Error; Harmless Error; Admission of Evidence.—

Where a witness answered a question objected to by stating that it might or might not, the overruling of the objection is harmless.—*Andrews v. The State*, 14.

Same; Recalling Witness.—Where a witness is recalled by the

state and the court refuses to permit him to restate what he has just stated on cross examination, no injury is done the defendant.—*Ib.* 14.

Appeal and Error; Harmless Error; Exclusion of Evidence.—

The erroneous exclusion of evidence is cured by the subsequent admission of such evidence.—*Dumas v. The State*, 42.

Appeal and Error; Harmless Error.—Where, in his subsequent

testimony a witness fully answered a question formerly propounded to him, if it was error to sustain objection to the question in the first instance it was rendered harmless.—*Smith v. The State*, 68.

Appeal and Error; Harmless Error; Refusal of Instruction.—

The refusal to defendant of all requested charges is not prejudicial where all the evidence, including that of the accused himself clearly shows his guilt, presenting a case for the general affirmative charge if such a charge can be given in a criminal case.—*Glasscock v. The State*, 90.

Same; Evidence.—The admission of testimony in a prosecution

for violation of the prohibition law that an election has been held in the county under the law was cured by the introduction of record evidence of the election and the result thereof as provided by the Act.—*Ib.* 90.

Appeal; Harmless Error; Admission of Evidence.—If it was error

to admit without proper identification pieces of slag found at the place of the robbery as the instruments used by the defendant, it was harmless as subsequent evidence was introduced fully identifying them.—*Davis v. The State*, 104.

Same; Harmless Error; Demurrer to Plea.—It is harmless error

to overrule a demurrer to a plea where the defendant was entitled to a verdict on another plea.—*Horan v. Gray-D. Hdw. Co.*, 159.

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Evidence.—It is not prejudicial error to permit a witness to testify

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Appeal and Error; Harmless Error; Instructions.—It is not error to reversal to give an abstract charge although inapplicable to the proof; and if the adversary party deemed it necessary that it be explained to make it applicable to the case, the duty was on such party to have requested explanatory charges.—*C. of Ga. Ry. Co. v. Dothan Mule Co.*, 225.

Appeal and Error; Harmless Error; Ruling on Pleading.—Where plaintiff was under the necessity of proving the averments attacked by demurrer in order to establish a prima facie case, which he did without dispute, it was harmless error to sustain a demurrer to such complaint.—*McDaniel v. Cain*, 344.

Same.—If not entitled to recover on the merits plaintiff could not recover for counsel fees, and where plaintiff was properly disallowed any recovery, the sustaining of a demurrer to the complaint so far as it sought to recover counsel fees was harmless.—*Ib.* 344.

Appeal and Error; Harmless Error.—It was not prejudicial, if erroneous to overrule a demurrer to a plea where the evidence without conflict showed that there was no breach of the contract which the pleas set up and alleged to have been breached.—*Poull & Co. v. Foy-Hays Const. Co.*, 453.

Appeal and Error; Harmless Error; Exclusion of Evidence.—Where all the evidence taken together, both the excluded and the admitted, will not support a judgment for the plaintiff, the exclusion of evidence offered by him is not prejudicial.—*Crone & Co. v. Long & Son*, 487.

Same; Harmless Error; Admission of Evidence.—Where there is other undisputed competent evidence of the same fact the admission of incompetent evidence as to that fact is harmless.—*Gambill v. Cooper*, 637.

3. Record.

(a) Necessity to show Pleading.

Criminal Law; Appeal; Record.—Where the grounds of demurrer to an affidavit is not set out in the record, this court cannot know on appeal whether the trial court erred or not in its rulings thereon.—*Harris v. The State*, 108.

(b) Matters not shown.

Same; Record; Matters Not Shown.—Evidence not in the record will not be considered on appeal.—*C. of Ga. Ry. Co. v. Ashley*, 145.

Appeal and Error; Review; Matter Not in Record.—Where the demurrers to the pleas are not shown by the record, the overruling of such demurrers cannot be reviewed.—*Horan v. Gray-D. Hdw. Co.*, 159.

Appeal and Error; Record; Questions Presented; Demurrer.—Where the record fails to disclose what the amendment to a complaint was, and the minute entry recites that the demurrer was sustained to the count as amended, the court's action relative to the demurrer to the amended count cannot be reviewed.—*Roach v. Quinn*, 340.

4. Presumptions on.

Appeal; Presumptions; Evidence.—Where there is no bill of exceptions showing what the evidence was before the trial court, it will be presumed on appeal to have been sufficient to support the conviction.—*Harris v. The State*, 108.

5. Disposition of Case.

Criminal Law; Disposition of Cause.—Where the evidence shows conclusively that there can be no conviction for the offense

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charged, a judgment of conviction will be reversed and the defendant discharged.—*Templin v. The State*, 128.

6. Assignment and Insistence.

Appeal and Error; Assignment; Insistence; Waiver.—Errors assigned but not insisted on are considered to be waived.—*City of Mtg. v. Bradley*, 230.

Appeal and Error; Insistence on Assignment; Sufficiency.—Statements in briefs that a specified instruction refused was correct on the effect of the evidence and could not be disputed; that specified instructions assert correct proposition of law and should have been given and that other specified instructions were supported by the evidence and should have been given, are not sufficient as inconsistent on such assignment to require their consideration by the Supreme Court.—*W. U. Tel. Co. v. Benson*, 254.

7. Objections Below.

Same; Objections Below; Instructions.—The duty is upon the party who conceives himself to have been injured by misleading instructions, to request instructions explanatory thereof; and if such party fails to do so in the trial court, he cannot complain of such misleading instructions on appeal.—*Poull & Co. v. Foy-Hays Const. Co.*, 453.

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8. Former Appeal.

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ASSAULT AND BATTERY.

Assault and Battery; What Constitutes.—Any touching by one person of the person or clothes of another in rudeness or in anger is an assault and battery.—*Hyde v. Cain*, 364.

ASSIGNMENT.

Assignment; Action on; Pleading.—The assignment of a contract for the payment of money must be by endorsement to authorize an assignee to sue in his own name under section 876, Code 1896.—*Bohanan v. Thomas*, 410.

Same; Real Parties in Interest.—Where the contract was for the purchase and sale of real estate and bound the vendor to erect a building on the premises sold, and the purchaser assigned the contract, an action for its breach by the vendor in failing to erect the building must be brought in the name of the purchaser for the use of the assignee.—*Ib.* 410.

Same.—As a defense to an action by the purchaser for the breach by the vendor of a contract to construct a building on the premises, pleas setting up a defense that the purchaser was not at the commencement of the suit the beneficial owner of the demand sued on and that before the commencement of the suit he had assigned his rights to a third person who was the beneficial owner, show that the third person was the beneficial owner at the commencement of the suit and that the suit must be brought in the name of the purchaser for the use of such third person.—*Ib.* 410.

ATTORNEYS.

See Trial, § 2.

Attorney and Client; Authority to Bring Suit; Mode of Questioning.—The authority of an attorney to bring suit is presumed, he being an officer of the court; if the authority is questioned, the matter should be determined by motion, and addressed to and decided by the presiding judge, so as not to be mingled with the merits of the controversy at the hearing.—*Brown v. French*, 645.

BANKS AND BANKING.

Banks and Banking; Liability to Depositor; Deposit by Partner for Benefit of Firm.—Where a member of a firm made a deposit in its favor of his own money taking a note from the firm for the amount of the deposit payable at bank, and on making the deposit took a deposit slip reciting that the deposit was to be protected by the bank for his benefit by compress receipt and bills of lading sufficient to cover the amount, the receipts to be deposited with the bank in like manner as other similar accounts, the effect of the whole transaction was a loan from him to the firm on their note, the money to be turned over to them by the bank when they deposited collateral for his benefit, so that he held the double obligation of the firm for the money, if the firm got it from the bank, and the obligation of the bank not to let the firm have the money without the deposit of collateral, the note not affecting the transaction between the depositor and the bank. The effect of the contract being that the bank would protect the deposit for the benefit of the depositor by taking from the firm compress receipts and bills of lading sufficient to cover the amount thereof, or that it would keep at all times the amount deposited or compress receipts or bills of lading deposited by the firm sufficient to cover the amount, or so much thereof as the bank let them have, and the bank was bound thereby unless released.—*First Nat. Bank v. Henry*, 367.

Banks and Banking; Special Deposits.—A deposit is special when it is a deposit of stocks, bonds and other securities, or of money to be specially kept and returned to the owner, or money deposited for a fixed period of time, or on unusual conditions, which is mingled in the general fund like a general deposit and repaid therefrom, or money which is to be applied by the bank at the depositor's request for specific purposes.—*Id.* 367.

Same; National Banks; Liability to Depositor.—Although there may be some ultra vires agreement connected with the transaction a national bank who has lawfully received property must account for it or its proceeds; it cannot escape liability for money placed in its hands by setting up that it made an ultra vires agreement with the depositor to pay out the money to some third person on deposit of collateral for the depositor's benefit, where it is shown that it paid out the money to such person without taking the collateral agreed on.—*Id.* 367.

Same; Default as Collecting Agent; Measure of Damages.—The holder of a bill or note is entitled to recover of a bank guilty of negligence or default as a collecting agency as measure of damages, the actual loss suffered, which is prima facie the amount of the bill or note placed in its hands; but evidence is admissible to reduce it to a nominal sum.—*Id.* 367.

Same; Failure to Secure Debt of Third Person to Deposit; Evidence.—Unless the bank showed that it had taken receipts or bills of lading sufficient to cover the amount deposited and which it had paid out to a third person under the contract, it could not avail the bank to show that there had been a shrinkage in the value of cotton, the action being against the bank for failure to take warehouse receipts for cotton, and bills of lading as collateral security, for the indebtedness of such third person.—*Id.* 367.

BANKRUPTCY.

Bankruptcy; Exemptions; Effect on Life Insurance Policy.—Since the Code exempts from all creditors the sum or amount of insurance becoming due and payable to the assured or the beneficiary and since the Bankruptcy Act exempts to the bankrupt such exemptions as are prescribed by the state laws in force at the time of the filing of the petition, the amount of insurance whether of the cash surrender value or of the sum of the policy payable to the bankrupt or his estate is exempt and the trustee in bankruptcy is not entitled to receive either from the bankrupt or from the insurance company.—*Chandler v. Traub*.—519.

BILLS AND NOTES.

Bills and Notes; Defenses; Failure of Consideration.—Failure of consideration, to be available in defense of an action on a note must be specially pleaded.—*Scott & Sons v. Rawls, et al.* 399.

Same; Payment.—Payment must be specially pleaded to be available as a defense to an action on a note.—*Ib.* 399.

Same; Plea of Payment.—As a defense to an action on a note a plea which alleges that the note was a part of a sum agreed on by the parties and settled on as the amount due from defendant to plaintiff, that the amount was paid in the manner therein set forth (though bad for failing to aver that the payment was made before the suit was brought) is not open to demurrer that it is double, or that it does not show the fact from which the indebtedness rose, or does not show that the order on a third person as set forth in the plea was given in payment of the note.—*Ib.* 399.

BILLS OF EXCEPTIONS.

Bill of Exceptions; Time for Filing; Extension.—Where the bill of exceptions is not signed within the time of the first order, and the order extending the time, and within which time the bill was filed and signed, is made by the court instead of by the presiding judge, such bill of exceptions cannot be considered.—*C. of Ga. Ry. Co. v. Ashley*, 145.

Same.—Circuit Court Rule No. 30, forbids the extension of time for signing a bill of exception to be extended into a succeeding term by agreement of counsel, but does not prohibit the extension by the presiding judge, except within the limits of six months. (Sec. 620, Code 1896.)—*Ib.* 145.

Bill of Exceptions; Signing; Time.—Where a bill of exceptions was signed on June 11, and signed by the trial judge, and recited that it was tendered and approved on June 9, and the trial judge certified that it was filed and approved within the time allowed by the court's order, it will be presumed on appeal that it was signed on the day it was filed, and that day being within the time fixed by the order of the court, the bill will not be stricken.—*Crabtree v. Nolan*, 652.

BLASTING.

See Explosives.

BOYCOTT.

Conspiracy; Boycott; Occupation.—To authorize a conviction under the anti-boycott law, Acts 1903, p. 282, it is necessary to show that the person against whom the act or conduct complained of were directed was engaged in a lawful occupation or intended to engage in such an occupation, and that the acts and conduct complained of had reference to the prevention of such an engagement or the pursuit of such an occupation.—*Burt v. The State*, 134.

CARRIERS.

See Railroads; Street Railway; Negligence; Master and Servant.

1. Of Passengers.

(a) Complaint.

Carriers; Passengers; Complaint; Sufficiency.—The facts stated in counts 11 and 12 would support a charge of simple negligence, but wanton or willful misconduct cannot be predicated upon them; and where on such facts stated, the pleader attempts to predicate a charge of wanton or willful misconduct, this renders such count inconsistent and repugnant in averment.—*St. L. & F. R. R. Co. v. Pearce*, 141.

Same; Actions; Materiality of Allegation.—Where the action was for damages for negligent failure to notify passenger where to change cars, an allegation that the train was propelled by steam, was immaterial and unnecessary to be proven.—*C. of Ga. Ry. Co. v. Ashley*, 145.

(b) Duty to Notify of Transfer Point.

Carriers; Passengers; Duty to Notify of Transfer Points.—A carrier owes its passengers the duty to advise them by reasonable means of schedules, routes and transfer points at which passengers should change in order to reach their destination.—*C. of Ga. Ry. Co. v. Ashley*, 145.

(c) Damages.

Same; Excessive Damages.—A recovery of \$500 damages is not excessive where the passenger, a lady, was deflected from her journey, compelled to undergo added travel and stops in hotels, resulting in annoyances, illness, anxiety and some expense, on account of the carrier's failure to notify her of a change of cars.—*C. of Ga. Ry. Co. v. Ashley*, 145.

2. Of Goods.

(a) Failure to Deliver.

Carriers; Failure to Deliver Goods; Contract of Shipment.—Where goods were shipped under a contract providing that no liability for damages or loss should attach to the company unless claim for such damage was promptly made after arrival, and if delayed more than thirty days, after delivery of the property, or after a due time for delivery, a plea which fails to allege that no claim was made within thirty days after due time for delivery is bad, the contract being relied on as a defense and the action being for a failure to deliver; nor can the court say, as a matter of law, in the absence of any agreement that from Feb. 27, to May 16, a due time for delivery had elapsed; neither can the court say, as a matter of law, that because part of the freight had been delivered on Feb. 27, a reasonable time had elapsed for the case not delivered.—*L. & N. R. R. Co. v. Price*, 213.

Carriers; Failure to Deliver; Freight Charges.—Evidence of what freight charges the consignee had paid on the case delivered is admissible in an action against a carrier for failure to deliver a case of goods included in the shipment, but which was afterwards delayed.—*Id.* 213.

(b) Live Stock.

Carriers; of Goods; Live Stock; Action for Damages; Instruction.—Where the action was for damages for injury to live stock by the consignee against the delivering carrier, a charge asserting that where the carriage of freight is to be over several connecting carriers, as in this case, it seems that if the consignee bringing the suit shows to the jury that the animals were in good condition when

CARRIERS—Continued.

delivered to the initial carrier, and that they were not in good condition when delivered to the discharging carrier, and the suit is against the discharging carrier, then these facts alone without more put the burden on the defendant, the discharging carrier, to show to the reasonable satisfaction of the jury that the harm and injury did not come to the animals while they were in the keep of the discharging carrier, is a clear and explicit statement of the law of this case and clearly not abstract.—*C. of Ga. Ry. Co. v. Dothan Mule Co.*, 225.

Same; Instructions; Effect of Testimony.—A charge asserting that the mere fact that a certain witness testified that the animals for whose injury the suit was brought did not show damage when they were unloaded by the initial carrier, did not prove that they were in good condition when delivered to the defendant, was properly refused for the reason that the question as to what the witness' testimony proved was for the jury and not for the court.—*Id.* 225.

3. Discrimination.

Carriers; Discrimination; Statutes.—Where a carrier made no distinction in rate between compressed and uncompressed cotton, but included in its rate the cost of compression and accorded to both places the same privilege of rebilling and through rating, but declined to compress the uncompressed cotton at a compress plant in the district, and carried the cotton to a distant place and had it compressed at a plant in which it was interested, though the cost of compression was not greater at one plant than at the other, this did not constitute the carrier guilty of discrimination in violation of sections 17 and 32, General Acts 1907, p. 123.—*R. R. Com. v. C. of Ga. Ry. Co.*, 550.

CHARGE OF COURT.

For charges in particular actions and crimes see that title.

1. Directing Verdict.

Trial; Directing Verdict.—In a prosecution for removing furniture under a contract of conditional sale in violation of section 7342, Code 1907, where the contract is properly received in evidence as being within the terms of the statute, the court properly refused to direct the verdict on the theory that the offense was not comprehended by such section.—*Steele v. The State*, 9.

2. Unintelligible Instructions.

Charge of Court; Unintelligible Instructions.—Unintelligible instructions are always properly refused.—*Steele v. The State*, 9.

Same; Unintelligible Instructions.—A charge asserting that the burden was not on the company, but on the plaintiff "before you how" sendee might have been found within the free delivery limit, etc., is properly refused as uncertain and unintelligible.—*W. U. Tel. Co. v. Benson*, 254.

3. Reasonable Doubt.

Charge of Court; Reasonable Doubt.—A charge asserting that the law demands that the minds of the jurors be so satisfied by the evidence that no reasonable doubt exists in them, but that their finding is correct, and accused guilty of the charge, and that if they are not satisfied in such a way, they should not convict, is involved and uncertain and properly refused.—*Andrews v. The State*, 14.

Charge of Court; Reasonable Doubt.—A charge asserting that if after considering all the evidence the jury had a reasonable doubt of the guilt of the defendant, they will give the benefit of the doubt to the defendant and return a verdict of not guilty, is a proper statement of the law; such charge is not covered by a charge given

CHARGE OF COURT—*Continued.*

as follows: If any member of the jury have a reasonable doubt of the guilt of defendant, the jury will not return a verdict of guilty.—*Letcher v. The State*, 59.

Charge of Court; Reasonable Doubt.—A charge asserting, "You cannot convict a man on any sort of evidence, but the law itself demands that the proof must show beyond all reasonable doubt that defendant is guilty as charged, else you should acquit him," is properly refused since the first statement therein is misleading.—*Smith v. The State*, 68.

4. Invading Province of Jury.

Same; Invading Jury's Province.—A statement by the court that the evidence on the part of the state goes to show that the defendant fired all three of those shots, goes beyond a statement of the tendencies of the evidence and becomes invasive of the province of the jury; and when the state's evidence tended to show that the decedent's pistol was fired once, the charge was not supported by the evidence.—*Andrews v. The State*, 14.

Same; Province of Jury.—An instruction that directs the finding of certain facts on the belief of certain evidence is invasive of the province of the jury.—*W. U. Tel. Co. v. Benson*, 254.

Charge of Court; Invading Province of Jury.—The action being for breach of contract with the defense of set-off of plaintiff's breach of that contract, an instruction asserting that it must be shown that the terms of the contract, including the plans and specifications, or some one provision or term thereof, has been broken was not improper as an invasion of the province of the jury.—*Poull & Co. v. Foy-Hays Const. Co.*, 453.

5. Covered by Instructions Given.

Charge of Court; Covered by Instructions Given.—It is not error to refuse instructions substantially covered by written instructions given. (Mayfield, J., dissents.)—*Howard v. The State*, 30.

6. Abstract.

Charge of Court; Instructions Abstract.—Where an instruction hypothesizes facts testified to by a witness in a case it may not be said to be abstract.—*Dial v. The State*, 66.

7. Requests for.

Trial; Instructions; Request.—Where counsel present several charges written on one sheet of paper, the court may treat it as a single request and refuse all the charges if one be bad. The better practice is to present each special charge to the court on separate pieces of paper.—*Anniston E. & G. Co. v. Roscn*, 195.

8. Undue Prominence to Evidence.

Charge of Court; Undue Prominence.—Charges which accentuate certain parts or phases of the evidence, are properly refused.—*L. & N. R. R. Co. v. Price*, 213.

Charge of Court; Singling Out Testimony.—A charge which singles out the testimony of one witness and asserts that it did not prove a certain fact not only singles out the testimony but requires of the court to pass upon the weight and sufficiency of evidence.—*C. of Ga. Ry. Co. v. Dothan Mule Co.*, 225.

Same; Undue Prominence to Evidence.—A charge asserting that if the jury believed the testimony of a particular witness, they must find certain things to be true, is properly refused as giving undue prominence to certain evidence and ignoring others.—*W. U. Tel. Co. v. Benson*, 254.

CHARGE OF COURT—*Continued.*

9. Assuming Facts.

Charge of Court; Instructions; Assumption of Facts.—Where the only physical circumstances surrounding a hole in the street was the dirt taken from the excavation, and the evidence was in conflict as to this, a charge asserting and assuming that there were circumstances around the hole, is properly refused.—*City of Mtg. v. Bradley*, 230.

Same; Assumption of Fact.—A charge assuming facts not shown undisputedly by the evidence is properly refused.—*W. U. Tel. Co. v. Benson*, 254.

Charge of Court; Assuming Fact.—A charge asserting that if plaintiff remained in the defendant's house after his term had expired defendant could sue to recover the house, did not assume any fact.—*Emerson Mfg. Co. v. Lowe*, 350.

9 1-2. Outside the Issues.

Same; Unsupported by Pleading.—Instructions are properly refused which charge upon issues raised by pleas to which demurrers have been sustained.—*W. U. Tel. Co. v. Benson*, 254.

10. Argumentative.

Charge of Court; Argumentative Instructions.—A charge asserting that the jury should consider the fact that plaintiff was one of six living brothers and that five of them and all four of the sisters were at the burial, in determining whether plaintiff suffered great mental pain as the result of the absence of the sixth brother, was argumentative and properly refused. (The action being for damages for delay in delivering the telegram.)—*W. U. Tel. Co. v. Benson*, 254.

Same.—A charge asserting that in permitting a recovery for mental suffering the law did not authorize the jury to guess at the amount, but requires them to consider very carefully the evidence and decide first whether plaintiff suffered any real mental anguish, and if the suffering was trifling, and such as men of ordinary manhood and self reliance would overlook, and ignore, substantial damages could not be awarded, is purely argumentative.—*Ib.* 254.

Same.—Charges asserting that in determining whether damages should be awarded for mental suffering, the jury must consider all the circumstances and recall all other aid and assistance plaintiff had at the funeral; that if as reasonable men the jury concluded that the plaintiff did not suffer any mental pain, they would violate their oaths by awarding damages greater than the toll paid, etc., are each argumentative and properly refused.—*Ib.* 254.

Charge of Court; Argumentative.—A charge asserting that public bridges are for the use of oxen and drays as much as for horses and buggies, was properly refused as argumentative.—*Cohn & Goldberg L. Co. v. Robbins*, 289.

11. Confessing.

Same; Confusing Instructions.—A charge asserting that the allowance of damages for mental pain or anguish should be considered by the jury only after mature and careful deliberation, and that none could be awarded unless all the jurors agree that plaintiff actually suffered mental pain because the addressee was not at the funeral, and that the proper amount to be allowed the sender for such mental pain must be agreed on by all the jurors, and that if they were unable to agree on the amount to be allowed, they could award only nominal damages, is involved and confusing.—*W. U. Tel. Co. v. Benson*, 254.

Same.—A charge asserting that the burden was on defendant to show when and where the message might have been delivered reasonably, and "your minds are left confused and uncertain as to wheth-

CHARGE OF COURT—*Continued.*

er ordinary and reasonably diligence would have succeeded in finding him, then your verdict must be for defendant," assumes that the jurors minds were confused and uncertain and was properly refused for that reason.—*Id.* 254.

12. Ignoring Issues.

Trial; Instructions Ignoring Issue.—Although the evidence showed an assault and battery, a charge asserting that if the jury believe the evidence they should find the issues in favor of the plaintiff was erroneous, where there was a plea setting up that at the time of the alleged assault plaintiff was on defendant's premises and refused to leave although requested to do so, whereupon defendant ejected plaintiff using only such force as was reasonably necessary therefor, and there was evidence tending to support the plea.—*Hyde v. Cain*, 364.

CODE SECTIONS CITED OR CONSTRUED.

Code 1896.

Form 20. p. 947. *Roach v. Quinn*, 342.

Form 27. *Gambill v. Cooper*, 637.

Section.

- 157. *Roy v. Roy*, 555.
- 436. *Poull & Co. v. Foy-Hays Const. Co.*, 453.
- 488. *Crabtree v. Nolen*, 652.
- 620. *C. of Ga. Ry. Co. v. Ashley*, 145.
- 750. *Letcher v. State*, 59.
- 759. *Roy v. Roy*, 555.
- 876. *Bohanan v. Thomas*, 410.
- 1251-1260. *First Nat. Bank v. Henry*, 367.
- 1291-1310. *Sullivan T. Co. v. Black*, 570.
- 1541. *Roe v. Doe ex dem. Rowe*, 614.
- 1813. *Price v. Dennis*, 625.
- 2146. *Gambill v. Cooper*, 637.
- 2152. *Byrd v. Hickman*, 505.
- 2152. *Elliott v. Bankston*, 462.
- 2607. *Chandler v. Traub*, 519.
- 3187. *Roy v. Roy*, 555.
- 3835. *Steele v. The State*, 9.
- 4287. *Hays v. Bowdoin*, 600.
- 4306. *Burt v. The State*, 134.
- 4651. *Birmingham W. W. Co. v. The State*, 118.
- 4914. *Letcher v. The State*, 59.
- 5208. *Reach v. Quinn*, 340.
- 5388. *Birmingham W. W. Co. v. The State*, 118.

Code 1907.

Form 24, p. 1199. *Tallassee Mfg. Co. v. 1st Nat. Bank*, 315.

Section.

- 1. *Bailey v. The State*, 4.
- 2. *Johnson v. The State*, 113.
- 10. *State v. Spurlock*, 122.
- 10. *Poull & Co. v. Foy-Hays Const. Co.*, 453.
- 1021. *Sloss-S. S. & I. Co. v. Green*, 178.
- 1540. *Carroll v. Burgin*, 406.
- 2310. *Vadeboncouer v. Hannon*, 617.
- 2476. *Hays v. Bowdoin*, 600.
- 2489. *Bohanan v. Thomas*, 410.
- 2868. *Poull & Co. v. Foy-Hays Const. Co.*, 453.
- 2990. *Brown v. French*, 645.
- 8205. *Blair v. Williams*, 655.

CODE SECTIONS CITED AND CONSTRUED—*Continued.*

- 3222. Sullivan T. Co. v. Black, 570.
- 3295. Blair v. Williams, 655.
- 3602. Sullivan T. Co. v. Black, 570.
- 3778. Carroll v. Burgin, 406.
- 3780. Carroll v. Burgin, 406.
- 3781. Jernigan v. Willoughby, 650.
- 3789. Carroll v. Burgin, 406.
- 3910. Subd. 2. Sloss-S. S. & I. Co. v. Green, 178.
- 4008. Smith v. The State, 68.
- 4009. Smith v. The State, 68.
- 4283. Brown v. French, 645.
- 4285. Brown v. French 645.
- 4499. Hays v. Bowdoin, 600.
- 4551. Julian Com. v. Guarantee L. Ins. Co., 533.
- 4579. Julian Com. v. Guarantee L. Ins. Co., 533.
- 4594. Fireman's F. Ins. Co. v. Hellner, 447.
- 4743. Adams v. The State, 115.
- 4853. Farmers O. & M. Co. v. Melton, et al. 469.
- 6268. Richards v. Burgin, 282.
- 6703. Emerson v. Lowe Mfg. Co., 350.
- 6703. Templin v. The State, 128.
- 6703. Harris v. The State, 108.
- 6733. The State v. Spurlock, 122.
- 6845. Frazier v. The State, 1.
- 6845. Pierson v. The State, 6.
- 6920. Pierson v. The State, 6.
- 7139. Marks v. The State, 71.
- 7144. Huckabee v. The State, 45.
- 7149. Huckabee v. The State, 45.
- 7247. Howard v. The State, 30.
- 7256. Andrews v. The State, 14.
- 7265. Howard v. The State, 30.
- 7270. Howard v. The State, 30.
- 7243. Steele v. The State, 9.
- 7243. Emerson v. Loe Mfg. Co., 350.
- 7585. Harris v. The State, 108.
- 7586. Harris v. The State, 108.
- 7587. Harris v. The State, 108.

CONFUSION OF GOODS.

Confusion of Goods; Commingling of Collateral; Liability of Bank.—Where a bank commingled its own collateral for cotton given to secure its own debts with collaterals which it held to secure a note payable to its bank owed to a depositor in such a way that it was impossible to distinguish one set from the other, all the collaterals became the property of the depositor for the security of his debt.—*First Nat. Bank v. Henry*, 367.

CONSTITUTIONAL LAW.

See Statutes.

1. Legislative Power.

(a) Dispensing with Indictment.

Indictment and Information; Misdemeanors; Legislative Authority to Dispense With.—The legislature is authorized to dispense with indictments and to authorize prosecutions and trials upon affidavit or complaint in misdemeanor cases.—*Glasscock v. The State*, 90.

2. Equality.

Constitutional Law; Equality; Penalty.—Section 4561, Code 1896, fixing a \$50 solicitor's fee for securing convictions against a

CONSTITUTIONAL LAW—*Continued.*

corporation for the violation of any of the laws of the state, is invalid as an unjust discrimination against corporations, except as to offenses peculiar to them; especially in view of the fact that a fee for solicitors of \$7.50 is fixed for convictions of other misdemeanors by individuals not otherwise provided for.—*Birmingham W. W. Co. v. The State*, 118.

Same; Equality; Classification.—A state may classify offenses according to its discretion; but such classification must rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without a just basis.—*Ib.* 118.

CONSTITUTION SECTIONS CITED OR CONSTRUED.

1875.

Section 6. Article 4. *Letcher v. The State*, 59.

1901.

Section.

5. *Templin v. The State*, 128.

7. *Templin v. The State*, 128.

8. *Templin v. The State*, 128.

45. *Glasscock v. The State*, 90.

62. *Tyler v. The State*, 126.

104. Subd. 21. *The State v. Spurlock*, 122.

168. *The State v. Spurlock*, 122.

CONTRACTS.

See Sales; Logs and Logging; Vendor and Purchaser.

1. Conditional Sales.

Contracts; Conditional Sale; Execution; Attestation.—One who receives a salary and has no interest in the goods sold other than the fact that he is the credit man and has charge of conditional sales of the firm, is not incompetent to witness the execution of the contract of conditional sales given to the firm.—*Steele v. The State*, 9.

Same; Construction.—The courts look to the purpose of a contract rather than the name given it by the parties in determining its real character.—*Ib.* 9.

2. Construction.

Contract; Vendor and Purchaser; Construction.—Where the contract of the sale of land payable in notes providing that the vendor agreed to erect a frame building on the premises before a designated date, such contract required the furnishing by the vendor of the materials for the building.—*Bohanan v. Thomas*, 410.

Contracts; Construction.—A contract should be construed if possible so as to support rather than defeat it; the whole instrument should be construed together in determining its meaning and so as to effectuate each part if possible; but should be construed most strongly against the person undertaking or entering into the obligation.—*Ashley v. Cathcart*, 474.

Same; Termination; Mutual Consent.—Independent of any provision in the contract permitting them to do so, parties to a contract may terminate it by mutual consent.—*Ib.* 474.

Same; Construction; Right to Terminate.—Where the contract provided that the plaintiff should remove his saw mill to a certain tract of land and manufacture logs into lumber as per bills furnished by the defendant from time to time, the defendant to furnish such logs as he desired to have sawed and further proving that the timber to be sawed under the contract should include all the timber bought

CONTRACTS—Continued.

by defendant on said tract and that the contract should continue so long as plaintiff complied therewith and until the timber on that tract was exhausted, unless otherwise terminated before that time, the defendant could terminate the contract by refusing or failing to furnish logs to be sawed.—*Ib.* 474.

Same; Contract; Silence as to Time of Payment.—The presumption is that the sale is for cash when the contract of sale is silent as to the time for payment, but this presumption is not conclusive and if the parties treat the contract otherwise, they are governed by the mutual construction given it.—*Baer & Co. v. Mobile C. & B. Mfg. Co.*, 491.

3. Consideration.

Sales; Contracts; Consideration.—Where, in the subleasing of premises an obligation to sell goods was incorporated, which obligation was binding only on the sellers, and the contract to sell was an inducement to the buyers to lease the premises, the obligation to pay rent under the sublease was a valuable consideration, not only for the use of the premises, but for the obligation of the seller to supply the goods.—*Baer & Co. v. Mobile C. & B. Mfg. Co.*, 491.

4. Breach.**(a) Measure of Damages.**

Sales; Breach by Buyer; Measure of Damages.—The measure of damages for the breach by the buyer of an executory contract for the sale of hosiery yarns entered into with the manufacturers of yarn, is the difference between the contract price and the market value of the yarn at the time and place of the breach, the yarn not being manufactured expressly for the buyer, and the seller not having to carry over for the season any manufactured yarns by reason of the breach.—*Gate City C. Mills v. Rosenau H. Mills*, 414.

Same; Breach of Contract; Damage.—Where the contract provided for the delivery of two grades of lumber, and there was evidence that the seller was short in delivery 324,000 feet, and that the price had advanced from \$2 to \$4 per M. feet, and that plaintiff's plant had been shut down for thirty days, for lack of material at a loss of \$15 per day, and that there was a discrepancy in inspection from which with the other evidence, the jury would have been authorized to assess \$1,500, and that there were 400,000 feet of uninspected lumber containing a large percentage of the cheaper grade which was charged for as the more expensive grade and there was also evidence from which it could be inferred that the two grades had been mixed by the direction of the seller for fraudulent purposes, a verdict for \$3,500 was not excessive as damages for breach of the contract.—*Baer & Co. v. Mobile, C. & B. Mfg. Co.*, 491.

(b) Allegation of Amount Due.

Contracts; Action for Breach; Allegation of Amount Due and Unpaid.—In an action for a breach of the contract a complaint alleging that plaintiff had complied with all of the provisions of the contract, but that defendant breached it by not paying the consideration of \$1,000 stipulated in the contract, sufficiently alleges the amount due and unpaid.—*Poull & Co. v. Foy-Hays Const. Co.*, 453.

(c) Remedy of Buyer and Proof.

Same; Breach; Remedy of Buyer; Default of Seller.—A breach of contract of sale by the buyer for failing to pay for an invoice during a certain year would not excuse a default of the seller for the previous year.—*Baer & Co. v. Mobile C. & B. Mfg. Co.*, 491.

CONTRACTS—*Continued.*

Same; Burden of Proof.—Where, under a contract to deliver lumber, two kinds of lumber were called for at different prices, in an action for a breach of such contract, if the buyer showed that the seller had commingled the different grades for a fraudulent purpose of collecting the price of the more expensive grade for the cheaper lumber, the burden was upon the seller to show the amount of the higher priced lumber delivered else it could all be considered to be of the cheaper grade.—*Ib.* 491.

Same; Action for Breach; Evidence; Non Compliance with Subsequent Agreement.—In an action for a breach of contract for a sale of lumber, begun by the buyer, and on proof that through subsequent negotiations, the buyer agreed to accept a delivery of a certain amount of other lumber as a substitute for the amount then in default, it was competent for the buyer to show a non compliance on the seller's part with the subsequent agreement, since a failure to deliver the lumber showed a non compliance with what it was understood would be a compliance with the original contract.—*Ib.* 491.

5. Rights of Strangers.

Contracts; Rights of Strangers.—Where the parties to a contract change it, and substitute a new one resting wholly in parol, neither a stranger nor the court can hold the parties to the first contract, although it be in writing and provide that its terms shall not be changed or varied except in writing.—*Long v. Shepherd*, 595.

CONTRIBUTORY NEGLIGENCE.

See Negligence, § 1.

CORPORATIONS.

See Municipal Corporations.

1. Organization.

Corporations; Organization.—Under the facts in this case it is held that the corporation known as Knight Henry & Co., was duly incorporated under the proceedings prescribed by the court of 1896, and contained in sections 1251-1260.—*First Nat. Bank v. Henry*, 367.

2. Estoppel to Deny Existence.

Same; Estoppel to Deny Corporate Existence; Parties.—Where parties contract with each other as corporations, in respect to such contract they are estopped to deny corporate existence.—*First Nat. Bank v. Henry*, 367.

3. Liability for Wrongs.

Corporations; Liability for Wrong; Ultra Vires.—The doctrine of ultra vires has no application as a defense to an action for a wrong of which a corporation is guilty.—*First Nat. Bank v. Henry*, 367.

Same; Liability for Acts of Servant.—Corporations are liable for the acts of their servants done in the scope of their employment in the same manner and to the same extent that individuals are liable under like circumstances.—*Ib.* 367.

4. Ultra Vires Acts.

(a) Guaranty.

Corporations; Ultra Vires Acts; Guaranty.—The charter power of the corporation to operate a commissary, to buy and sell goods, and to purchase for cash or credit, was ancillary to its main business of lumbering and milling, but did not authorize the corporation to buy goods for another, or to become surety or guaranty for another; hence, the acts of the general manager of the corporation

CORPORATIONS—*Continued.*

In promising to pay for goods bought by a boarding house keeper was ultra vires the corporation, although it indirectly benefitted the corporation by furnishing board and lodging for its employees.—*Gulf Y. P. L. Co. v. Chapman & Co.*, 444.

5. Dissolution.

Corporation; Foreign Corporation; Dissolution; Continuance for Purpose of Winding up.—A corporation of the state of Florida dissolved by a decree of the Florida court under section 2155, Rev. St. of Florida, 1892, has full power to sell or lease its corporate property in Alabama through or by its directors as trustees under said Florida section, in the absence of any law in Alabama, to the contrary.—*Sullivan T. Co. v. Black*, 570.

Corporation; Dissolution; Directors; Authority.—The directors or trustees of a business corporation are the managing agents of the corporation, and have all the authority of the corporation itself in the conduct of its ordinary business including the right to convey its property in the absence of any restriction in its charter or by-laws, or of statutory or constitution inhibition, and statutes fixing the authority of the directors as trustees to wind up the business of the corporation and a decree dissolving the corporation does not deprive the directors of their powers as agents of the corporation, so that a subsequent order of the court is not necessary to authorize them to sell the corporate property.—*Ib.* 570.

Same; Officers; Compensation; Effect of Dissolution.—Where at the instance of stockholders, a corporation is dissolved and placed in the hands of trustees, the office of president of the corporation was terminated, and the incumbent at the time is not entitled to receive a salary as president in addition to compensation as receiver to which he was appointed subsequent to the dissolution; even if entitled to such compensation, the former president's remedy would be at law and not in equity.—*Ib.* 570.

COSTS.

Fines; County Convicts; Costs; Rate.—Under the provisions of General Acts 1907 (1 S. S.) p. 183; sec. 13, the rate per day for a county convict sentenced to hard labor for the county for the payment of the cost of his conviction, is forty cents and not thirty cents.—*Glasscock v. The State*, 90.

Costs; Prior Suit.—Where it was conceded that the costs of a prior suit which had been dismissed by plaintiff, had been satisfied, it was proper to deny a motion to stay further proceedings in the subsequent suit because the cost of the former action has not been paid.—*City of Mtg. v. Shirley*, 239.

Costs; At Law and in Chancery.—The statutes and rules regulating costs at law and in equity are entirely different, since in chancery under the provisions of section 3222, Code 1907, cost may be apportioned at the discretion of the chancellor.—*Sullivan T. Co. v. Black*, 570.

Same; In Equity.—The discretion reposed in chancellors to apportion cost is a legal one to be exercised in accordance with general rules and precedents, and the chancellor cannot arbitrarily give or without cost at pleasure.—*Ib.* 570.

COURTS.

1. Time of Opening.

Courts; Time for Opening.—The Act of 1890-1, p. 68, amending section 750, Code 1886, only repeals said section so far as it applies to the counties mentioned therein, and does not have the effect to

COURTS—*continued.*

revise and extend the section so as to make it apply to counties previously removed from its influence, and does not have the effect of repealing Acts 1888-9, p. 64, authorizing the opening of the courts in the 3rd and 5th circuit at 10 A. M.—*Letcher v. The State*, 59.

CRIMINAL LAW.

For particular crimes, see appropriate titles.

1. Former Jeopardy.

Criminal Law; Former Jeopardy.—While, under the facts in this case, the state might have proceeded against the defendant under either sections 6920 or 6845, Code 1907, yet, if a prosecution is had under the latter section and the defendant acquitted, such acquittal was a bar to his further prosecution for obtaining the money, etc., under false pretenses.—*Pierson v. The State*, 6.

2. Double Conviction.

Criminal Law; Double Conviction for Single Act Violating Too Statutes.—There can be but one conviction for a single act although it may violate two penal statutes, so that an indictment charging both a violation of the abusive language statute and of the use of threats against the anti-boycott act, both growing out of a single act, will not support a verdict that finds the defendant guilty as charged in the indictment, and further finds the defendant \$133, etc., since under such verdict, the fine must be referred to both offenses; the proper practice in such a case, is to instruct the jury that if convinced of defendant's guilt of one or both of the offenses the verdict should be guilty of only one of the offenses.—*Burt v. The State*, 134.

CRIMINAL CONTRACT.

See Frauds, § 1.

DAMAGES.

For damages in particular actions see that title.

Damages; Personal Injuries; Services of Physician.—Where the complaint alleges expenses incurred in employing medical aid and buying medicine, it is competent to show the reasonable value of the services of plaintiff's physician.—*City of Mtg. v. Shirley*, 239.

Damages; Personal Injury; Excessive.—A verdict and judgment for \$3,000.00 is not excessive where the plaintiff was permanently injured in the leg, suffered great mental pain and distress, loss of earning capacity, and incurred large doctor's bills.—*Ib.* 239.

Damages; Punitive Damages.—Punitive damages are not recoverable as a matter of right, being apart from compensation, but their imposition is discretionary with the jury, the discretion being a sound and legal one not to be exercised arbitrarily.—*Coleman v. Pepper*, 310.

Same; Instructions.—The court should instruct the jury on the question of punitive damages in such a way that they will understand that in fixing such damages they should consider the enormity of the wrong and the necessity of preventing similar wrongs, and that they should impose such an amount as in their sound judgment the exigencies of the case demand not to exceed the amount claimed.—*Ib.* 310.

DEATH.

See Damages.

Death; Action; Pleading; Defenses.—As a defense to an action against an officer for killing a person whom he was attempting to arrest, a plea setting up that at the time mentioned in the complaint the defendant was sheriff of a certain county, that a warrant for the

DEATH—Continued.

arrest of plaintiff's intestate had been placed in his hands, that while two of his deputies were undertaking to arrest intestate, he undertook to escape, and while fleeing from said deputies was shot and killed by one of them, and that the shooting reasonably appeared to be necessary to prevent the escape of intestate, is insufficient as a plea of justification, as it does not aver that the officer gave information to the intestate of his authority, nor does it set out such fact as exempted the officer from giving such information and does not show that the intestate could not have been taken by other means.—*Richards v. Burgin*, 282.

Same; Arrest; Right to Kill.—If in the lawful pursuit of a person charged with felony, an officer may kill such person if necessary to prevent his escape.—*Id.* 282.

Same; Jury Question.—The question of the necessity of killing a person is one to be determined by the jury where the action is against an officer for causing the death of a person whom he is attempting to arrest.—*Id.* 282.

DEEDS.

Deeds; Validity; Incapacity and Undue Influence.—Where a deed is made by a parent to a child, whether natural or adopted, the parent is presumed to be the dominant party in the transaction and the burden is on the party assailing the deed to show incapacity or undue influence.—*Stanfill v. Johnson*, 546.

Same; Parties; Capacity.—In order to avoid a conveyance, incapacity to understand a thing done as distinguished from mere weakness, must be shown.—*Id.* 546.

Same; Evidence.—The evidence in this case stated and examined and held to show that the party making the deed under which the complainant claims had the requisite legal capacity.—*Id.* 546.

DETINUE.**1. Judgment in.**

Detinue; Judgment; Sufficiency.—A judgment entry in detinue which fails to assess separately each article sued for, or which fails to assess the value of the property, or its alternate value, is not in compliance with section 3781, Code 1907, and is insufficient.—*Jernigan v. Willoughby*, 650.

2. Possession.

Detinue; Prior Possession; Recovery.—A plaintiff showing prior possession recovers in detinue against a wrong doer.—*Blair v. Williams*, 655.

Witnesses; Cross Examination.—In an action of detinue for a horse, a witness who had testified that he traded the horse to plaintiff a year or two before should not be permitted to be asked on cross examination whether it was plaintiff's horse or plaintiff's father's horse for which he swapped, since the inquiry was in reference to title to a different horse from that involved in the suit.—*Id.* 655.

DEPOSITS.

See Banks and Banking.

DISCONTINUANCE.

See Dismissal and Nonsuit.

DISCRIMINATION.

See Carriers, § 3.

DISMISSAL AND NONSUIT.

Dismissal or Non Suit; Grounds; Discontinuance.—The summons and complaint was filed with the circuit clerk on April 3, 1907, but was not executed before the spring term of the court, and was returned to the court without any return of service after the expiration of the time of service, and the cause was not docketed at such term. On August 31, following under the plaintiff's direction, the clerk erased the date in the summons and complaint originally filed and inserted the date of August 31, 1907, refiled the papers, signed the summons and delivered them to the sheriff who executed and returned the same on September 5, and the case was placed upon the docket. Held, that under this state of facts it was error to dismiss the action brought on August 31, on the grounds that there had been a discontinuance, for if there was a discontinuance of the first action, the plaintiff could bring the second; and if there had not been a discontinuance, the pendency of the first action would be a matter of plea in abatement to the second action and not a plea in bar.—*Farmers O. & M. Co. v. Melton*, 469.

Same; Voluntary Dismissal; Acts Constituting.—Where a summons and complaint was filed in April but not served in time for the next term of court, and was returned without endorsement of service, and the date of filing was erased by direction of the plaintiff and a subsequent date inserted and the case docketed, if not a dismissal of the first action, was tantamount to a dismissal in vacation, though not intended as such, it not being necessary to notify the defendant of such dismissal as there had been no service in the first instance. (Section 5357, Code 1907.)—*Ib.* 469.

Same; Discontinuance; Nature and Effect.—A discontinuance is in effect an abandonment of the same cause and a declaration of plaintiff's willingness to stop the action, but it is not an adjudication of his cause by the proper tribunal nor an acknowledgment by him that his claim is not well founded.—*Ib.* 469.

DISTILLING.

See Intoxicating Liquors, § 4.

DYING DECLARATIONS.

See Homicide, § 4.

EJECTMENT.

See Adverse Possession.

Ejectment; Evidence; Jury Question.—Where there is evidence of adverse possession of a tract of land, and also evidence that the uncleared land on the tract had been put to such uses as it was susceptible of in its then state, in the way of fire wood, rail timber, etc., the question of whether there had been possession of it adversely, was a question for the jury, and the court should not have directed a verdict for plaintiff.—*Chambers v. Morris*, 606.

Ejectment; Burden of Proof.—The burden was on the plaintiff to show such survey, where the deed relied on by plaintiff described the land as bounded on one side by a line to be run by a surveyor so as to embrace ten acres, the surveyor's map, etc., to be recorded as part of the deed.—*Hayes v. Martin, et al.*, 609.

Same; Evidence.—The evidence in this case examined and stated and held sufficient to sustain the judgment rendered.—*Ib.* 609.

Ejectment; Pleading; Issue.—Where the general issue is pleaded as a defense to a statutory action in the nature of ejectment, a special plea of the statute of limitation is unnecessary and may be stricken.—*Vadeboncouer v. Hannon*, 617.

EJECTMENT—*Continued.*

Ejectment; Tax Title; Tax Deeds; Evidence.—Where the purpose of the offer is not stated and there is no evidence of a preceding valid sale the auditor's deed for land sold for taxes is properly excluded when offered as a muniment of title by defendant.—*Ib.* 617.

Same.—The Act of Feb. 9, 1895, (Acts 1894-5, p. 488) does not have the effect to confer upon purchasers the benefit of section 2310, Code 1907, and a docket of tax sales which fails to show a valid sale is inadmissible in ejectment.—*Ib.* 617.

Same; Limitation.—It is within the power of the Legislature to enact statutes of limitation placing purchasers holding tax deeds issued by the auditor under Acts 1894-5, p. 488, in a weaker position than that occupied by those holding deeds from the judge of probate issued under the general order in sales of lands for taxes.—*Ib.* 617.

Ejectment; Pleading; Initial Process.—In common law ejectment the service of the declaration with the notice is the initial process in the cause and takes the place of a summons and complaint against the person in possession.—*Tenn. C. I. & R. R. Co. v. Wise*, 632.

Same; Notice; Subscription.—The notice annexed to the declaration served in common law ejectment should be subscribed with the name of the casual ejector, to be regular; but though formerly, such proceedings were set aside for an irregular signature, later it is recognized as sufficient if it is subscribed with the name of the plaintiff's lessor or of any other person.—*Ib.* 632.

Same; Failure of Person in Possession to Come In; Judgment.—Where the person really in possession fails to come in after service of the declaration and notice in common law ejectment, the first judgment that should be rendered is a judgment nisi against the casual ejector, unless the tenant in possession appears and pleads to an issue within a certain time mentioned in the rule, and after the time set the judgment is made final against the casual ejector, but not against the real person in possession.—*Ib.* 632.

ELECTION OF OFFENSES.

See Indictment and Information, § 5.

EQUITY.

For various Equitable Actions see appropriate title.

1. Bill.

(a) Multifariousness.

Equity; Bill; Multifariousness.—Where it was necessary to construe a deed of trust in order to quiet title, and such reliefs were necessary to each other their joinder did not render the bill multifarious.—*Berger v. Butler*, 539.

ESTOPPEL.

See Landlord and Tenant.

Estoppel; Position Assumed.—Where one with knowledge of the facts assumes a particular position in judicial proceedings such one is estopped to assume a position inconsistent therewith to the prejudice of the adverse party; so, where a defendant, in order to carry a case of forcible entry and detainer from the justice to the circuit court under a section 4283, Code 1907, makes an affidavit that he entered the premises peaceably and not under claim of any agreement, contract or understanding with the plaintiff, such defendant is estopped to introduce evidence in contradiction of the affidavit.—*Brown v. French*, 645.

ESTOPPEL—Continued.

Estoppel; Necessity of Pleading.—While at common law estoppel in pais need not have been pleaded, under our statute (Sec. 3295, Code 1907) it is necessary that it be specially pleaded; and hence, the fact that plaintiff's attorney with ample authority silently permitted the sale of the horse in question and its purchase by the defendant for valuable consideration, such attorney being present at the sale, should be specially pleaded in an action in detinue.—*Blair v. Williams*, 655.

Estoppel; General Estoppel; Nature; Disclaimer.—Where one, by his statements as to matters of fact, or as to his intended abandonment of existing rights, designedly induces another to change his conduct, or alter his condition in reliance thereon, he is estopped from denying the truth of his statement or from enforcing his right against his declared intention of abandonment.—*Richards v. Shepherd*, 663.

Same; Acts Constituting.—Where iron railing for use in a building had been delivered to the contractor, and the contractor abandoned the work after the delivery of the railing, and while indebted to the seller for them, and the cost of the railing had been included in an estimate of materials furnished and paid by the owner to the seller, and charged to the contractor's account with the seller's consent, and the seller subsequently took the railings from the premises of the owner with the distinct understanding that they were to be returned and put on the building, the owner of the premises having claimed the railing as his property, the seller was estopped from denying the owner's right of possession, and from asserting his own right.—*Id.* 663.

EVIDENCE.

For evidence in particular actions and crimes see that title.

Demonstrative Evidence.

Evidence; Demonstrative Evidence.—A witness having testified that he was at the place of the killing and that another witness who had testified that he was there, in fact was not there, it was competent for the witness to state whether he could have seen such other witness, had he been present.—*Andrews v. The State*, 14.

2. Character.

Same; Character of Accused; General Character.—A witness having testified that he had known the defendant sixteen or seventeen years, and knew his general character, and that it was good, answered in response to a question as to what he based his estimate on, that he had known accused and that accused had worked for him a good while, and had access to all his valuables, that he never missed anything, and that accused had always been obliging and polite, but that he did not base his estimate upon that alone as he had never had any occasion to think the defendant's character bad. Held, the further facts testified to by the witness was not sufficient to take from the jury the testimony that he knew defendant's character and that it was good, hence, it was error to exclude such testimony.—*Andrews v. The State*, 14.

Same.—Testimony of good character generally, not given from the witness' knowledge of the defendant's general character, but based on the general observation of the defendant by the witness is properly excluded.—*Id.* 14.

3. Expert and Opinion.

Evidence; Opinion Evidence.—The relative attitude of decedent and the instrument or person inflicting the fatal wound being an inference of fact capable of being drawn by the jury, a witness can-

EVIDENCE—*Continued.*

not give his expert opinion in reference thereto.—*Dumas v. The State*, 42.

Evidence; Opinion Evidence.—One not shown to be an expert is not competent to testify as to the proper way of driving a heading in a coal mine, or as to the manner in which the work had been done.—*Penn. C. Co. v. Bowen*, 165.

Same; Opinion Evidence; Expert Evidence.—The question as to whether or not the proper inspection of the coal mine entrance would detect the loose condition of the roof before the falling of the rock is a proper one for expert evidence, and one who has dug coal for fifty-five years and for twenty years of that time has been a miner of coal in Alabama, is qualified to testify as an expert.—*Gloss-S. S. & I. Co. v. Green*, 178.

Same; Opinion Evidence; Mental State.—A witness not being competent to testify as to a particular person's mental status, his testimony that a woman who was driving the horse was so anxious that she got the impression on her part that she was in danger, is not admissible, in an action for injury occurring in a collision between an ox team and wagon and a horse and buggy.—*Cohn & Goldberg L. Co. v. Robbins*, 289.

Same; Expert Testimony.—Where there was evidence that the driver of an ox team was an experienced ox driver and as to how he was managing the team at the time of the accident, it was competent for such driver to give his opinion as to whether the team was driven at the time in a proper manner.—*Id.* 289.

Evidence; Opinion Evidence; Conclusion.—Testimony by an employe of the tariff association that he thought the defendant insurance company was a member of the tariff association, but did not think the agency which issued the policy was within the jurisdiction of any stamping office, was not a mere conclusion but tended to show that the defendant was connected with the tariff association, which was within the issues made by the pleading.—*Fireman's F. Ins. Co. v. Hellner*, 447.

Evidence; Opinion Evidence; Technical Terms.—Evidence of expert lumber mill men as to the meaning of "mill cull" and "shipping cull" in the customary parlance of mill men was admissible, where it was a question as to the kind of cull delivered, since such terms are technical and not commonly known to courts and juries.—*Baer & Co. v. Mobile C. & B. Mfg. Co.*, 491.

4. Judicial Knowledge.

Evidence; Judicial Knowledge; Intoxicating Liquors.—Courts cannot take judicial knowledge that mead or metheglin is an alcoholic, spirituous, vinous, malt or intoxicating liquor or beverage, or that it will produce intoxication if drunk in excess.—*Marks v. The State*, 71.

Evidence; Judicial Notice; Clearing House Certificate; Value.—Courts will not take judicial notice of a particular clearing house or of the nature of the clearing house certificate issued by it.—*Johnson v. The State*, 113.

Evidence; Judicial Notice; Justices of the Peace.—While the court takes judicial notice of who are the justices of the peace, yet the court cannot judicially know that there are not others of the same name, and hence cannot judicially know that the signature is that of the Justice of the peace issuing process, where the same is signed, individually, and without insignia of office of any kind.—*Reach v. Quinn*, 340.

5. Best and Secondary.

Evidence; Best Evidence; Collateral Issues.—The question of the title and deed being wholly collateral to the main issue, it was

EVIDENCE—Continued.

competent for a witness to testify that he sold the land on which the distillery was operated to defendant and made him a deed there-to.—*Moore v. The State*, 97.

Evidence; Secondary Evidence; Preliminary Proof.—It is largely in the discretion of the trial court as to the admission of preliminary proof of acts necessarily precedent to the right to introduce secondary evidence of the contents of documents and papers.—*Baer & Co. v. Mobile C. & B. Mfg. Co.*, 491.

Same; Sufficiency.—Where notice was served on defendant's counsel, and on one of defendants present at the trial, to produce an original letter written defendant, and it was not produced, though its possession is not denied, the court acted within its discretion in permitting the writer to give parol evidence as to the contents of the letter.—*Id.* 491.

6. Conclusions.

Evidence; Conclusion.—A question to a coal miner as to whose duty it was to inspect and keep up the roof of the entry of the mine calls for a fact and not for the conclusion of a witness.—*Sloss-S. S. & I. Co. v. Green*, 178.

7. Lost Instruments.

Evidence; Lost Instrument; Secondary Evidence.—Secondary evidence of the contents of a lost instrument is not admissible until the loss and search for same has been shown by each and every custodian thereof.—*Huggins v. So. Ry. Co.*, 189.

8. Documentary.

Evidence; Documentary Evidence; Receipt.—A receipt signed by mark by an agent of the consignee of goods, although not attested or acknowledged, is valid, and its effect cannot be limited on its admission in evidence in an action against the carrier for a failure to deliver the goods receipted for.—*L. & N. R. R. Co. v. Price*, 213.

9. Res Gestae.

Evidence; Res Gestae.—Where the sendee was blind and the message was read to him by the agent of the company before giving it to him, it was competent, as part of the *res gestae* of the delivery to show what the agent read to the addressee as the telegram.—*W. U. Tel. Co. v. Benson*, 254.

Same; Res Gestae.—Where, in a conversation between the superintendent of the defendant and an attorney, relative to the swearing out of a warrant for the arrest of the plaintiff, the statement made in such conversation by the superintendent that the defendant did not want the plaintiff arrested, was admissible as a part of the *res gestae*, especially in view of the fact that the superintendent is then seeking legal advice as to arresting the plaintiff, although without this the latter statement would not have been admissible by itself.—*Emerson Mfg. Co. v. Lowe*, 350.

10. Declarations of Persons in Possession.

Evidence; Declaration of Persons in Possession; Admissibility. The object of the declaration being solely for the purpose of proving that the property which injured the buggy belonged to the defendant, and no notice of such declaration having been given to defendant, the declaration of the driver of the team made after the accident as to the ownership of the team, was not admissible.—*Cohn & Goldberg L. Co. v. Robbins*, 289.

Same; Relevancy; Res Gestae.—A declaration made while in the actual possession and control of personal property, and explana-

EVIDENCE—Continued.

tory of such possession, was admissible as part of the *res gestae* of such possession.—*Ib.* 289.

11. Parol to Vary Writing.

Same; Parol Evidence; Adding to Terms of Writing.—A warrant of arrest can not be aided as to its validity by parol evidence to show that the person who signed it was a Justice of the Peace; warrants should be valid on their face to authorize their execution.—*Reach v. Quinn*, 340.

Evidence; Parol to Vary Writing; Deeds; Description.—Where the description in the deed is unambiguous and fixes the corner of a lot at a certain point, parol evidence is not admissible to show that the corner was 12 feet from the point fixed in the deed.—*Foster v. Carlisle*, 621.

Evidence; Declarations to Grantor.—The declaration of the grantor made to the grantee at the time of the execution of the deed that the deed embraced erroneously a 12 foot strip on a certain side of the lot conveyed, are not admissible for the purpose of contradicting the unambiguous description in the deed.—*Ib.* 621.

12. Motive or Intention.

Evidence; Motive or Intention; Competency.—Where the superintendent of the defendant testified that he swore out the warrant on his own responsibility, such testify related to the capacity in which he acted, and not to his intention or motive, and was consequently admissible.—*Emerson Mfg. Co. v. Lorce*, 350.

13. Hearsay.

Evidence; Hearsay; Admissions.—Plaintiff, in a suit for libel, testified, in answer to a question as to whether it had been reported to him that the defendant in the suit had been denouncing him as a liar, that he had an interview with defendant, and stated what he had heard that defendant had said about him, but did not tell defendant even substantially what he testified had been reported to him, as having been said by the defendant, and defendant repeated it to him. Held, such testimony was *prima facie* hearsay and not rendered competent as an admission by the defendant under plaintiff's statement.—*Sheppard v. Austin*, 361.

Same; Reasons for Exclusion.—Hearsay evidence is excluded for the reason that the original statement, if correctly reported, is not under the safeguard of the personal responsibility of its author as to its truth, or the test of cross examination; and for the further reason of the probability of the introduction of falsehood and misrepresentation into a statement, either willfully or unintentionally, which probability is greatly multiplied in each repetition.—*Ib.* 361.

Evidence; Hearsay.—Declarations of a former physician and neighbor of a person that such person is dead are hearsay and not admissible to prove death.—*Chambers v. Morris*, 606.

14. Pedigree.

Same; Pedigree Evidence.—It must appear that the person making the declaration is dead before the declaration of such person as a member of the family is admissible on the theory of pedigree evidence, that another member of the family is dead.—*Chambers v. Morris*, 606.

EXEMPTIONS.

See Bankruptcy.

EXPLOSIVES.

Trespass; Injuries From Blasting.—The throwing of rocks or stones or other debris from blasting, upon the lands of another, constitutes a trespass.—*Birmingham Ore & Min. Co. v. Grover*, 276.

Explosives; Negligence; Burden of Proof.—A person has a right to use explosives on his own land, and if injury occurs from such use, the burden is on the person injured to show negligence in the use.—*Ib.* 276.

Same; Injuries From Blasting; Duty of Using Care.—Where a person is blasting on his own land and knows, or by the exercise of reasonable diligence, could know that another person is in dangerous proximity, it becomes the duty of the person using the explosive to use means to prevent the throwing off of missiles, or to give warning when the blast is about to be fired, that those near may seek a place of safety.—*Ib.* 276.

Same; Action; Pleading.—In an action for damages resulting in personal injury from blasting, it is necessary to allege that the person in charge of the blasting knew, or had reason to believe, or could by reasonable diligence have known that a person injured was in a position where the missiles from the blasting would probably reach and injure him, although it was not necessary to aver actual knowledge of the proximity of such person at the time.—*Ib.* 276.

FALSE PRETENSE.

See Frauds.

False Pretense; Indictment; Description of Person to Whom Pretense was made; Corporation.—An indictment for obtaining money by false pretense alleging that the false pretense was made to the Louisville & Nashville Railroad Company, a corporation, sufficiently alleges the person to whom the false pretense was made, since section 1, Code 1907, provides that the word, person, shall include a corporation as well as natural person.—*Bailey v. The State*, 4.

FEEES AND COSTS.

See Costs.

1. Solicitors Fees.

Fees and Cost; Solicitor's Fees; Misdemeanors.—Section 5388, while making the willful obstruction of a public road a misdemeanor, affixes no penalty, and is within the class of misdemeanors not otherwise provided for; hence, the solicitor's fee on such conviction is \$7.50, notwithstanding the provisions of section 4561, Code 1896, provides a solicitor's fee of \$50 for securing a conviction of any corporation for a violation of any of the laws of the state.—*Birmingham W. W. Co. v. The State*, 118.

FORCIBLE ENTRY AND DETAINER.

1. Detainer.

Landlord and Tenant; Unlawful Detainer by; Pleading.—Although no provision is made in the statutory form for an averment as to the terms of the lease contract, if the form used complies substantially with the form required by form 27, Code 1896, the complaint will be sufficient, although the terms of the lease contract is set out therein.—*Gambill v. Cooper*, 637.

Landlord and Tenant; Unlawful Detainer; Damages; Rent Pending Appeal.—Section 2146, Code 1896, provides for the recovery of rent pending an appeal in unlawful detainer cases, and hence evidence as to the rental value of the premises pending the appeal was admissible.—*Ib.* 637.

FORCIBLE ENTRY AND DETAINER—*Continued.*

Same; Demand; Notice; Sufficiency.—Where the lease provided that if the premises should be sold during the term of the lease the lessee would give possession thereof after reasonable notice of the sale, a notice of such sale given more than forty days before a written demand for possession, is a reasonable notice under the lease.—*Ib.* 637.

2. Entry.

Forcible Entry and Detainer; Persons Entitled to Sue; Right of Tenant.—Where the tenant's consent to the entry and removal of the fence was in violation of the duty the tenant owed to the landlord, the tenant was entitled to bring forcible entry and detainer for the possession of the lands so occupied although the entry and removal of the fence was done in a peaceful manner.—*Brown v. French*, 645.

Same; Title of Defendant.—Where it appears that defendant's entry was acquiesced in by the plaintiff, thus constituting it an entry by agreement, the defendant cannot introduce evidence to show title in himself in an action in forcible entry and detainer. (Section 4285, Code 1897.)—*Ib.* 645.

Same; Evidence; Relevancy.—The character of the house kept by plaintiff is irrelevant as evidence in an action for forcible entry and detainer.—*Ib.* 645.

FRAUD.

1. Violating Contract.

Fraud; Violating Contract; Evidence.—Where the prosecutor had testified that he went to a certain point in Pike County distant from his home, and secured defendant and brought him back to his home because he was a surety on defendant's bond for his appearance to answer a criminal charge, and that this was done a short time before defendant entered into the contract alleged to have been violated, it was competent for the defendant to show that the grand jury had met, considered the charge for which he was bound to appear and had found no bill against him, since such evidence tended to shed light on the intent of the defendant in entering into the contract, and for the further purpose of impeaching the testimony of the prosecutor by showing that he did not bring defendant back for the purpose stated, he not being at that time liable as a surety.—*Frazer v. The State*, 1.

Same.—The contract alleged to have been violated was properly admitted in evidence since it was in compliance with the statutory requirements.—*Ib.* 1.

Same; Writing.—The word, writing, as used in section 6845, Code 1907, includes printing as well.—*Ib.* 1.

FRAUDS, STATUTE OF.

Frauds; Statute of; Leases; Necessity for Writing.—A lease of land for six years must be in writing, else it is within the statute of frauds. (Sec. 152, Code 1896.)—*Elliott v. Bankston*, 467.

Same; Statutory Exceptions; Possession.—Although the statute required that a lease for a longer term than one year shall be in writing yet where the lessor's agent put the lessee in possession of the land, although only verbally authorized to do so, such possession took the lease without the statute of frauds although it was for a six year term.—*Ib.* 462.

Frauds; Statute of; Promise to Pay Debt of Another.—A promise to pay another's debt, based on no other consideration than the creditor's forbearance to press the original debtor, is a collateral undertaking within the statute of frauds, and not an original obligation on the part of the promisor.—*Byrd v. Hickman*, 505.

FRAUDULENT CONVEYANCES.

Fraudulent Conveyances; Nominal Consideration; What is.—The court will take judicial notice of the fact that \$2 was merely a nominal consideration for property worth from \$1,500 to \$2,000, when asked to set aside such conveyance as a fraud.—*York, et al. v. Levrett*, 529.

Same.—A deed may be technically a voluntary instrument, although founded on some consideration; and where a valuable consideration is necessary to support a deed, the bare recital of a nominal pecuniary consideration, does not show a valuable consideration; and hence, where land had been sold for \$960, with the reservation of a vendor's lien and the purchasers subsequently, when insolvent, and without having paid the vendor's notes, conveys the land to another on the recited consideration of \$2 for the purpose of hindering, delaying or defrauding creditors, and defeating the lien of the note, his vendee will be held a mere volunteer and the deed ineffectual so far as the rights of the prior creditors of the original purchaser are concerned.—*Id.* 529.

HIGHWAYS.

1. Use for Trowel.

Highways; Use for Travel; Instruction.—A charge asserting that if the jury believed that immediately prior to or at the time of the collision the driver of the oxen did all that a prudent and careful driver could have done, to prevent the collision, they could not find for the plaintiff, would justify a finding for the defendant, although the driver might have done nothing immediately prior to the collision to prevent it, and its refusal was proper.—*Cohn & Goldberg L. Co. v. Robbins*, 289.

Same.—A charge asserting that if the jury believe that defendant's driver was a prudent driver of steers, and that he used every means in his power to prevent a collision, they must find for the defendant, is improper since the driver might have been a prudent driver and yet not competent to manage a team of the character of one in possession.—*Id.* 289.

Same.—A charge asserting that if, at the time of the accident, the oxen became suddenly frightened, and the driver did all that a skillful and prudent driver could have done under the circumstances to prevent the accident, the jury should find for the defendant, and if they believe that the injury was occasioned by the sudden fright on the part of the oxen and that the driver did all that a reasonably prudent and careful driver could do to prevent the accident, they should find for the defendant, pretermits the absence of fault on the part of the driver in the sudden frightening of the oxen.—*Id.* 289.

Same.—A charge asserting that if the driver of the oxen did all that was possible to be done at the time of the accident to prevent the same, and he was a competent driver, the jury could not find for the plaintiff, limits the preventive effort to the time of the accident and was properly refused.—*Id.* 289.

Same.—Where the action was against the C. & G. Lbr. Co., and the evidence tended to show that the oxen and wagon doing the damage was the property of the C. & G. Lbr. Co., a charge asserting that unless the jury believed from the evidence that the oxen were the property of the C. & G. at the time of the accident, they must find for the defendant, is properly refused.—*Id.* 289.

HOMICIDE.

1. Evidence.

Homicide; Evidence; Clothing.—The clothing worn by deceased at the time of the killing, are proper subjects of evidence and may be introduced.—*Andrews v. The State*, 14.

HOMICIDE—Continued.

Same; Identification of Weapon.—It was competent to show the character and condition of pistols introduced on the preliminary examination for the purpose of aiding the jury in determining whether they were the same pistol, and in the same condition as when introduced, on the preliminary trial.—*Ib.* 14.

Same.—The statement not being in the nature of a confession it was competent to show that shortly after the shooting the defendant stated that he did not know who did the shooting.—*Ib.* 14.

Same; Evidence; Harmless Error.—It was not prejudicial to defendant to admit evidence of threats by decedent against the accused, and the communication thereof to accused together with the fact that on being informed of the threat the accused said that if decedent was going to kill him he was going home.—*Dumas v. The State*, 42.

Evidence; Acts and Declarations of Defendant.—The conduct, demeanor and expression of a defendant at or about the time of the homicide are admissible in evidence against him, but unless part of the *res gestae* are not admissible for him; if, however, the state introduces his confessions, declarations or admissions, then the defendant may give in evidence all that he said in connection therewith and the circumstances attending it, but cannot make this the basis of showing what he did or said on other occasions.—*Maddox v. The State*, 53.

Homicide; Evidence; Acts of Defendant.—It was proper to show in a prosecution for homicide that after the affray the defendant went home and got a gun, and within fifteen or twenty minutes came back, and that when he returned he told certain persons to turn deceased loose or get out of the way as he was going to shoot him; and the state having shown this, the defendant should have been permitted to prove that just before leaving home he stated that he was going after one F. and have him make deceased stop his fuss, as part of the *res gestae* of that matter, though not a part of the *res gestae* of the killing.—*Ib.* 53.

2. Instructions.

(a) Self Defense.

Same; Instructions; Ignoring Defense.—Where there was evidence tending to show self defense, a charge asserting that if the jury believed that the defendant killed the deceased, then defendant was guilty and the next thing to do was to fix the degree of punishment, ignored the evidence of self defense, and was improperly refused.—*Andrews v. The State*, 14.

Same; Self Defense.—A charge asserting that if the defendant was attacked by the deceased with a deadly weapon in his own livery stable, defendant was under no duty to retreat from his antagonist, is properly refused as misleading.—*Ib.* 14.

Same; Duty to Retreat.—A charge asserting that where one without fault is attacked by another, and he kills his assailant, if the circumstances furnish reasonable grounds for apprehending a design to take his life or do him some great bodily harm, and for believing the danger imminent, and that such design will be accomplished, the homicide is justifiable, although it may turn out that the appearance was false and that there was in fact no such design nor any danger of its being accomplished, fails to hypothesize the defendant's belief that he was in imminent peril, and does not mention the matter of domicile or retreat.—*Ib.* 14.

Same.—Charges asserting that one feloniously attacked in his own place of business, is not bound to retreat even though by so doing he might secure his safety, but may stand his ground and take

HOMICIDE—Continued.

his assailant's life if it becomes necessary, and the homicide is justified; that homicide is justifiable when committed by one into whose place of business the deceased was endeavoring in a violent manner to force himself with the intention of unlawfully assaulting the owner thereof, are each properly refused as argumentative and misleading.—*Ib.* 14.

Same; Self Defense; Apprehension of Danger.—If one is attacked by another in his own house or place of business in such a manner as would raise in the mind of a reasonable man the belief that he is in imminent danger of great bodily harm, and such an one is so impressed then he is under no obligation to retreat, and will be justified in taking his assailant's life, provided he was without fault in bringing on the difficulty.—*Ib.* 14.

Same; Defense of Person; Burden of Proof.—In a prosecution for homicide the burden is on the state to show that the defendant was in fault in bringing on the difficulty and is not on the defendant to show that he was free from fault.—*Ib.* 14.

(b) Elements of Offense.

Same; Elements; Malice.—If there is a reasonable doubt as to whether the killing was done maliciously, a defendant cannot be convicted of murder.—*Andrews v. The State*, 14.

Same; Instructions; Elements of Offense.—A charge asserting that the state must show beyond a reasonable doubt, all the constituents of the crime charged before accused is called upon to explain any circumstances connected therewith or to make any defense thereto, leaves to the determination of the jury a question of law as to what elements constitute the offense, and the evidence might show the commission of a lesser degree of crime covered by the indictment, although the evidence might not show the constituents of the crime charged.—*Ib.* 14.

3. Cause of Death.

Homicide; Death of Decedent; Cause.—Where the evidence clearly disclosed that death was the result of the wound inflicted and that blood poison developed, the defendant could not justify by proving that the wound was trifling and that the decedent was so diseased as to readily become infected with blood poison.—*Dumas v. The State*, 42.

Homicide; Instructions.—It was error to refuse an instruction requiring the acquittal of defendant unless deceased died from the effects of a wound inflicted by defendant with a knife, since the indictment charged the killing by cutting with a knife, and the evidence showed that there were pistol wounds on deceased's body and incisive wounds which may have been inflicted by a knife, or by a barbed wire fence with which deceased came in contact.—*Huckabee v. The State*, 45.

Same; Indictment; Evidence; Variance.—Where the indictment charged that the defendant killed deceased by cutting him with a knife the defendant cannot be convicted upon proof that he shot deceased with a pistol or threw him against a wire fence, cutting him.—*Ib.* 45.

Same; Cause of Death.—It is not necessary that the blows given deceased by defendant, or the defendant's wrongful act, should be the sole cause of decedent's death, in order to render the defendant guilty of homicide; for if the blow or blows or the defendant's wrongful act, contributed to the death, or hastened it, the defendant would be responsible according to the circumstances of the particular case.—*Ib.* 45.

HOMICIDE—Continued.**4. Dying Declarations.**

Same; Dying Declarations; Admissibility.—Whether offered by the state or by the accused, declarations made by the decedent as to the difficulty resulting in the fatal wound are inadmissible without a proper predicate.—*Dumas v. The State*, 42.

INDICTMENT AND INFORMATION.

See Intoxicating Liquors, § 1; Affidavits.

1. Return and other Requisites.

Indictment and Information; Return; Presence of Grand Jurors—Section 4914, Code 1896 is sufficiently complied with when the record recites that the indictment was returned into open court by the foreman in the presence of all the other grand jurors, and it was shown that there were more than eleven other grand jurors present.—*Letcher v. The State*, 59.

2. Sufficiency.

Larceny; Affidavit; Sufficiency.—An affidavit which charges the commission of the offense of larceny, or of any other offense, as a fact, is stronger than is required by the Constitution and statutes and is sufficient on which to issue process and found a conviction.—*Harris v. The State*, 108.

Same; Sufficiency; Language of Statute.—An indictment which follows the language of Acts 1903, p. 282, sec. 4, with the words, "at any place, he or she sees fit" omitted it is a sufficient indictment under such Act, since the words, omitted are mere surplusage.—*Burt v. The State*, 134.

3. Joinder of Offenses.

Indictment and Information; Conjunctive Averment; Proof.—Where two offenses are charged conjunctively in an indictment or affidavit, proof must be made of both charges in order to sustain a conviction.—*Templin v. The State*, 128.

Same; Joinder of Offenses.—An affidavit charging a trespass and a refusal to leave the premises after being warned, and the complaint charges conjunctively.—*Id.* 128.

4. Misjoinder of Offenses.

Indictment and Information; Misjoinder of Offenses; Demurrer.—Demurrer is not the proper method for taking objection for a misjoinder of offenses which are misdemeanors, as misdemeanors not belonging to the same family of crime may be joined in an indictment; however, the rule is different as to felony.—*Burt v. The State*, 134.

5. Election.

Indictment and Information; Election.—Although the counts of an indictment may charge and the proof may show the violation of two or more misdemeanor statutes, yet if the violation was caused by a single criminal act no occasion for an election by the state is presented, since the purpose of an election is the protection of the defendant from prosecution for two or more like offenses under one count.—*Burt v. The State*, 134.

INFANTS.

Infant; Disabilities; Effect of Marriage.—The marriage in Alabama of a woman between the ages of eighteen and twenty-one years removes her disability of non-age, and her subsequent removal to another state, where marriage does not have that effect, does not incapacitate her to sue in Alabama. (Section 4499, Code 1907.)—*Hays v. Bowdoin*, 600.

INFANTS—*Continued.*

Same; Necessity for Guardian or Next Friend.—A married woman under the age of eighteen years who has no guardian should sue by next friend.—(Section 276, Code 1907.)—*Ib.* 600.

INJUNCTION.

Injunction; Dissolution on Coming in of Answer.—Where the answer fully denied the equity of the bill seeking the injunction, a temporary injunction issued thereon is properly dissolved.—*Long v. Sheppard*, 595.

Same; Subjects; Public Officers; Contract.—While the illegal acts of public officers may be enjoined, mere acts of mistake in judgment cannot be, and county commissioners having authority to contract for the construction of county buildings cannot be enjoined from the fulfillment of the contract although it was inexpedient and not so good a contract as they or others might have made.—*Ib.* 595.

Counties; Contract; Injunction by Tax Payer.—As the provision of the contract that no change should be made in the contract except on the order of the commissioner's court was for the benefit of the contracting parties, and not for strangers, a citizen and tax payer cannot enjoin the payment of claims for extra work by a contractor under a contract with the court of county commissioners.—*Ib.* 595.

INSANE PERSONS.

Evidence; Presumption; Sanity.—The law presumes everyone to be sane until the contrary is shown.—*Stanfill v. Johnson*, 546.

INSURANCE.

Insurance; Cancellation of Policy; Jury Question.—The question as to whether defendant's agent had complied with instructions from the company to cancel the policy under its terms was one for the jury, under the evidence in this case.—*Fireman's F. Ins. Co. v. Heller*, 447.

Same; Cancellation of Policy.—Some affirmative act by an agent being necessary to effect a cancellation, the fact of ownership of the insurance company received by the insured is properly directing him to cancel the policy, did not of itself operate as a cancellation thereof.—*Ib.* 447.

Same; Regulation; Validity.—Section 4504, Code 1907, is constitutional and valid, and authorizes a recovery in the nature of a penalty of 25 per cent of the loss covered by the policy for a violation of the statute, but not of the loss sustained not covered by the policy.—*Ib.* 447.

Insurance; Life Insurance; Forfeiture; Failure to Pay Premium.—Unless the policy so provides, the failure to pay the premium does not forfeit the contract.—*Equitable L. Assu. Soc. v. Golson*, 508.

Same.—Within the limitation of the statute, a condition that a life policy shall be forfeited for non payment of any premium is a condition subsequent, and non performance avoids the policy unless waived.—*Ib.* 508.

Same.—A condition in a life policy providing a forfeiture for non payment of premium is for the benefit of the insurer, and strictly construed; a forfeiture will not be enforced unless such is the plain meaning of the contract.—*Ib.* 508.

Same.—Where the policy provides that on default in any annual premium after the 3rd premium has been paid, the policy may be surrendered for a non participating paid up policy, providing the policy be returned to the insurer within six months after date of default,

INSURANCE—*Continued.*

otherwise the policy shall cease, does not provide a forfeiture of the policy within six months from default; after default insured has under such provision six months in which to elect, to surrender the policy and get paid up insurance or to pay the premium, should he decide not to surrender the policy; on failure to elect the policy does not become forfeited for six months after default.—*Id.* 508.

Insurance; Contract; Parties; Contract.—The word, assured, as used in an insurance contract, generally speaking, is synonymous with the word, insured, although sometimes applied to the beneficiary; but where a third party secures a policy on another's life such third party is spoken of as the "assured" since the contract is with such party.—*Chandler v. Traub*, 519.

Insurance Contract; Statute; Class.—Where a life insurance company issues contracts providing for a special income in consideration of the insured rendering services to the company on request and providing for the creation by the company of a dividend fund for the class holding such policies, etc., does not violate sections 4579, Code 1907, since the word class qualifies policy holder, and means the holders of like contracts.—*Julian, Com. v. Guarantee L. Ins. Co.*, 533.

INTOXICATING LIQUORS.

See Words and Phrases.

1. Illegal Sale.

Intoxicating Liquors; Illegal Sale.—Where a number of persons contributed money to buy whiskey, and one of the number takes the money and goes off and buys whiskey and brings it back, and such person has no interest in the whiskey before the sale and no interest in the sale, such person is not guilty of retailing liquor without license.—*Deal v. The State*, 66.

Same; Wrongful Sale; Complaint; Time.—Where the indictment or affidavit attempts to charge an offense against a statute which went into operation within twelve months from the time of the filing of the complaint, time becomes a material ingredient of the offense, and the complaint is fatally defective, if it fails to allege that it was committed after the act took effect.—*Marks v. The State*, 71.

Intoxicating Liquors.—The evidence in this case stated and examined and held sufficient to sustain a conviction for dealing in intoxicating liquors in violation of Local Acts 1907, p. 249.—*Glasscock v. The State*, 90.

Intoxicating Liquors; Evidence; Jury Question.—Under the evidence in this case it was a question for the determination of the jury as to whether the defendant was guilty of violating the local prohibition law, and the court improperly directed the verdict.—*Hallmark v. The State*, 101.

2. Prohibition Statutes.

Intoxication Liquors; Statute; Construction.—Section 1 of General Acts, 1907, 1st Special Session, by the use of the terms "or other liquors or beverages by whatsoever name called, which if drunk to excess, will produce intoxication" does not mean to qualify and relate to each and all of the liquors or beverages which precede such clause, and hence, the statute does not prohibit the sale of such other beverages or liquors unless they contain sufficient alcohol to produce intoxication if drunk to excess.—*Marks v. The State*, 71.

Same; Contents; Jury Question.—It is a question of fact for the jury to determine whether a beverage contains 1.46% alcohol by

INTOXICATING LIQUORS—*Continued.*

weight, and 1.88% by volume, and 1.20% maltose, making about two and a half teaspoonfuls of alcohol to the pint, is an alcoholic, spirituous, vinous, malt or intoxicating liquors, or whether if drunk to excess, will produce intoxication.—*Ib.* 71.

Same; Statutes; Prohibition.—Where a statute named designates or enumerates classes or species of beverages or liquors which are prohibited to be sold or dealt with, and it clearly appears that a given beverage is within the scope of the forbidden enumeration, and is intoxicating, its properties are immaterial, and not a subject of inquiry in a prosecution for the wrongful sale thereof.—*Ib.* 71.

Same; Statutes; Legislative Power.—It is within the power of the legislature to absolutely prohibit the sale of intoxicating beverages, to say what are intoxicating, what are prohibited and what are not, and to designate them by general or special terms.—*Ib.* 71.

3. Definition.

Same; Definition.—Intoxicating liquors are liquors intended for use as a beverage, and capable of being used as such, which contain alcohol in such per cent that they will produce intoxication when imbibed in such quantities as may be practically drank; and this, regardless of how the alcoholic constituents are obtained; but the term, intoxicating liquors, is not synonymous with spirituous, liquors, since all spirituous liquors are intoxicating liquors, yet all intoxicating liquors are not spirituous liquors.—*Marks v. The State*, 71.

4. Distilling without License.

Intoxicating Liquors; Evidence; Distilling; Jury Question.—The evidence in this case stated and examined and held sufficient to require a submission to the jury of the questions of defendant's interest in the distillery, and sufficient to support a conviction.—*Moore v. The State*, 97.

Intoxicating Liquors; Distilling Without License; Instructions.—It is not essential to a conviction for distilling without license that the person operating the still should have an interest therein, and a charge requiring a finding of the jury that defendant owned an interest in the distillery before he could be convicted, is properly refused.—*Ib.* 97.

Same.—A charge asserting that there must be an acquittal if the defendant did not operate the distillery alone, is properly refused as misleading.—*Ib.* 97.

JEOPARDY.

See Criminal Law, § 1.

JOINDER AND MISJOINDER OF OFFENSES.

See Indictment and Information, §§ 3 and 4.

JUDICIAL KNOWLEDGE.

See Evidence, § 4.

JUDGES.

See Trial, § 1.

1. Duty as to charging.

Same; Duty of Judge.—It is the duty of the judge in charging the jury to give the law applicable to all theories presented by the testimony, and if he recapitulates the evidence on the one side to recapitulate it also on the other, and not to indicate by the manner or matter of the charge what are his own views as to the effect of the testimony.—*Andrews v. The State*, 14.

JUDGMENTS.

See Detinue.

1. Construction.

Judgment; Construction of Entry; Demurrer.—The judgment entry in this case stated and examined, and held to show only a ruling on demurrer to the whole complaint asserting the damages claimed to be remote and speculative, and not upon demurrers to the separate counts of the complaint.—*C. of Ga. Ry. Co. v. Ashley*, 145.

2. Right to on Plea.

Judgment; Right to; Establishment One Plea.—A defendant is entitled to a judgment where the evidence establishes one of his several pleas just as much as if all were established.—*Horan v. Gray. D. Hdw. Co.*, 159.

3. Default.

Judgment; Default Judgment; Corporation; Recitals.—A judgment by default against a corporation must show the fact that proof was made to the court and that the court ascertained that the person on whom process was served was such an officer or agent of the corporation as by law was authorized to receive service of process for and on behalf of the corporation.—*Spurlin Merc. Co. v. Lauchheimer*, 512.

Judgment; Default; Setting Aside.—The courts are very liberal in setting aside a regular default judgment in ejectment to let the tenant in to defend his possession, where there is merit in his defense.—*Tenn. C. I. & Ry. Co. v. Wise*, 632.

Same; Default Judgment; Process to Sustain.—Although the pleadings in default ejectment are fictitious, if a plaintiff adopts that mode of action, it should be pursued in accordance with the law establishing the procedure; and where the notice is not signed by anyone a default judgment rendered and made final not only against the casual ejector but also against the persons in possession, is void, since the declaration and notice takes the place of the summons and complaint.—*Ib.* 632.

JURISDICTION.

1. Transfer of Causes.

Criminal Law; Jurisdiction; Transfer of Causes; Bessemer City Court.—Where the transcript from the criminal court of Jefferson county as copied into this record discloses that on motion of defendant an order was entered on a stated date transferring this case to the city court of Bessemer, and ordering all papers in the case, transferred to the Bessemer city court, together with a transcript of the minutes of the Jefferson criminal court, showing the organization of that court, and its grand jury that returned the indictment, it sufficiently appears from the record that the case had been transferred from the Jefferson criminal court to the Bessemer city court on a specified date, giving said city court of Bessemer jurisdiction to hear and determine the cause under section 16, Acts 1900-01, p. 1854.—*Andrews v. The State*, 14.

JURY AND JURORS.

1. Petit Jurors.

(a) Empanelling, Excusing, etc.

Jury and Jurors; Empanelling; Excusing for Cause.—For good cause shown the court may, in its discretion excuse certain persons summoned as jurors in empanelling regular jurors at the organization of the court.—*Andrews v. The State*, 14.

JURY AND JURORS—Continued.

Same; Empanelling.—It is not error to exclude testimony as to the manner in which a petit jury is drawn, since section 7526, Code 1907, makes the requirements regarding the selection of jurors directory merely, so that no objection can be taken to a venire for a petit jury except for fraud in drawing or summoning.—*Id.* 14.

(b) Qualifications.

Same; Qualification; Residence.—Section 33, Acts 1900-01, p. 1870, requires that petit jurors in criminal cases shall be drawn and summoned from the district over which the court has jurisdiction, and it is error, to place on a jury a person living outside the district; so in completing a jury for the trial of a capital case, it is error to place on the jury a person living more than two miles from Bessemer, although he lives within two miles of the county court house at Birmingham.—*Andrews v. The State*, 14.

Same; Qualifications; Prior Service.—Under sections 7247 and 7270, Code 1907, regular jurors drawn for the week in which a capital case is set, are not competent as jurors for the trial of such case upon its being passed to a subsequent week of the term, although they were ordered back to serve only for the trial of this special case, during such subsequent week, since they constitute a part of the regular venire and not of the jurors specially drawn.—*Howard v. The State*, 30.

(c) Special venire.

Jury; Venire; Illegality.—The fact that a capital case set for trial for the second week of court was passed to the succeeding week, did not render the special venire drawn when the case was set, illegal.—*Howard v. The State*, 30.

JUSTICES OF THE PEACE.

1. Jurisdiction (criminal.)

Justices of the Peace; Criminal Jurisdiction.—The criminal jurisdiction of justices of the peace is of legislative rather than constitutional creation, and the legislature may withdraw this jurisdiction whenever deemed expedient, so that Acts 1900-01, p. 794, is a valid enactment, although it withdraws criminal jurisdiction from the justice of the peace of Mobile; and such act is not repealed by section 6733, Code 1907, as that section applies only to justices of the peace having criminal jurisdiction.—*The State v. Spurlock*, 122.

2. Appeals from.

Justices of the Peace; Appeal From; Proceeding; Objection; Time.—Where defendant appealed to a jury from a judgment of the justice of the peace, and the plaintiff took part in the trial before the jury without objecting to the appeal because no bond was given as required by the statute, plaintiff cannot raise that objection for the first time in the court to which defendant appeals from the judgment in the jury trial since the proceedings are otherwise regular and appeals from justice's judgment are triable de novo. (Sec. 488, Code 1896.)—*Crabtree v. Nolan*, 625.

Justice of the Peace; Record; Pleading.—A recital in the judgment by the justice court in the transcript 'that this day came the parties and the defendant pleaded in short by consent and has leave to offer any facts in evidence which may be specially pleaded' is not sufficient to warrant the assumption that pleas to the jurisdiction of the justice court were embraced in the general leave and consent to plead in short; and to justify the circuit court in ignoring a plea in abatement to the jurisdiction of the justice it need not be denied that such matter in abatement might have been shown under the indefinite leave appearing in the recital.—*Blair v. Williams*, 655.

LANDLORD AND TENANT.

1. Renting on shares.

Landlord and Tenant; Renting on Shares; Relation.—Where one furnishes the land, teams, feed for the teams and the farming implements, and another furnishes the labor to make the crop with an agreement to divide, the relation of employer and employe exists between them.—*Adams v. The State*, 115.

2. Liability for Damages on Account of condition of Leased Premises.

Landlord and Tenant; Leased Premises; Injuries From Defects.—A tenant takes premises in the condition in which they are when leased, and the landlord is not liable to the tenant for injury to the tenant's property resulting from the unsafe condition of the premises unless the landlord has agreed to repair or has misrepresented the condition of the premises; and this is true, whether the tenant rents all or only a part of the premises.—*Charlie's Transfer Co. v. Malone*, 325.

Same; Injuries from Defective Condition; Complaint.—Counts which allege that plaintiff leased the lower story of the defendant's building; that there were pipes running through a portion of the building to convey water to the second floor and that one of them burst, and water leaked through the second story on plaintiff's goods; that defendant was negligent in that the pipes were defective and unsound, and that it was the duty of defendant to keep the pipes in a sound condition, and on account of his failure they burst, charged negligence in that the pipes were defective, and are, therefore, demurrable on account of a failure to show a covenant to repair, an agreement in respect to the condition of the building or a misfeasance on the part of the landlord.—*Ib.* 325.

Same; Pleading.—The averment that the defendant landlord was the owner of the premises and had charge and control of the water pipes, by and through her agent, and knew that said pipes were defective and unsound and negligently failed to repair the same is not equivalent to an averment that the pipes were defective at the time of the lease or negative the fact that the tenant knew it, and made no effort to ascertain the condition of the premises.—*Ib.* 325.

Same.—In an action by a tenant of the first floor of the building against the landlord for injuries from water pipes bursting on the second floor, a count which avers that the landlord had at the time the care and charge of keeping such pipes in repair and good order; that it was her duty to do so, and in the exercise of such care and charge defendant failed to keep said pipes in good order and was negligent in using weak and defective pipes, and that by reason thereof, the pipes burst or leaked, and that such negligence is the proximate cause of the damages, being on the theory of a failure to keep in repair a portion of the building not rented to plaintiff is demurrable for failing to aver knowledge or notice of the defect on the part of the defendant.—*Ib.* 325.

3. Lien.

Landlord and Tenant; Lien; Who Entitled.—A mere rental agent of the owner of the land is not entitled to a lien on the crops for advances made to a tenant.—*McDaniel v. Cain*, 344.

4. Tenant Estopped to Deny Title.

Landlord and Tenant; Title of Landlord; Tenant Estopped to Deny.—The general rule is that a tenant entering into possession of land under a lease must surrender the possession to the landlord be-

LANDLORD AND TENANT—*Continued.*

fore he can assall or question the title under which he enters; the exception to this rule is that the tenant may show the termination of the landlord's title or that he has acquired the same since the creation of the tenancy, but this exception does not permit the tenant to assert an outstanding title which he may purchase or permit him to attorn to the person having an outstanding title hostile to that of the landlord.—*Duncan v. Guy, et al.* 524.

Same; Waiver of Surrender.—The evidence in this case stated and examined and held not to show a waiver of a surrender of possession by the landlord so as to permit the tenant to set up an outstanding title acquired by him hostile to the landlord.—*Id.* 524.

Landlord and Tenant; Title of Landlord; Estoppel of Tenant.—A tenant cannot make a valid attornment to another, nor by mere acquiescence authorize another to violate the possession which he holds for the landlord, the duty being upon the tenant to bear fealty to his landlord.—*Brown v. French*, 645.

LARCENY.

Larceny; Indictment; Nature of Property.—Since the provisions of the Code of 1907, Section 2, that the words, personal property, shall include money, evidences of debt, etc., an indictment alleging the taking of clearing house certificates, the personal property of another, sufficiently alleges the taking of property that is the subject of larceny, in the absence of evidence showing the nature of such certificate.—*Johnson v. The State*, 113.

Same; Description of Property.—An indictment charging the taking and carrying away one bill of the denomination of twenty dollars, lawful money of the United States of America, and four clearing house certificates of the denomination of five dollars each, issued by the clearing house association of the aggregate value of twenty dollars, sufficiently describes the property taken.—*Id.* 113.

Larceny; Property Subject to Larceny; Crop After Removal From Land.—If one severs crops from the land, and by a subsequent act takes it or removes it with the intent to steal, such act constitutes larceny, although while attached to the land the crop is not the subject of larceny.—*Adams v. The State*, 115.

Same; Instructions.—A charge asserting that before the jury could convict they must be satisfied beyond a reasonable doubt that the corn was severed from the freehold, and if they believe that the defendant severed the corn, and then carried it away, they should acquit, does not hypothesize the fact that larceny could have been committed by a separate act of the accused in taking the corn after he had severed it from the realty, and was properly refused for that reason; especially where the evidence tended to show the severing by one act and the taking by a subsequent act.—*Id.* 115.

LIBEL AND SLANDER.

Libel and Slander; Construction of Language Used.—In construing or interpreting alleged defamatory language, the whole expression must be considered in the light of the common acceptation of the terms employed, as they are colored, emphasized or qualified by the context.—*Johnson v. Turner*, 356.

Libel and Slander; Actionable Words; Imputing Moral Turpitude.—Words spoken of a person that he had destroyed a docket or public record belonging to the mayor's office to cover up evidence of his misappropriation of public funds and fines belonging to the town were defamatory per se as imputing moral turpitude.—*Id.* 356.

LIMITATIONS OF ACTIONS.

1. Criminal.

(a) Misdemeanors.

Indictment and Information; Conviction of Lesser Offense; Limitation.—A conviction for assault and battery under an indictment charging assault with intent to murder, cannot be sustained if the assault and battery is barred by the statute of limitations, although the felony charged is not so barred.—*Letcher v. The State*, 59.

Trial; General Charge; Request.—Where the prosecution was for a felony and the conviction was for a misdemeanor, and there was no evidence to show that the misdemeanor was barred by the statute of limitation, the general charge which did not separate the misdemeanor from the felony, the point not having been otherwise raised, was properly refused, where the evidence authorized a conviction of the felony.—*Ib.* 59.

2. Civil.

(a) Amendment.

Limitation of Actions; Pleading; Amendment.—Where the original complaint alleges the failure of the company to keep the stock gays in repair on account of which stock entered upon the lands and destroyed the crop, an amended complaint alleging a negligent failure to keep the cattle guards in repair thereby allowing hogs to pass over the stock gap into the lands of plaintiff, is within the lis pendens, and relates back to the original complaint, and is not subject to the statute of limitations.—*C. of Ga. Ry. Co. v. Sturgis*, 222.

Appeal and Error; Questions Reviewable; Immaterial Matter.—Where the original complaint was brought within a year of the injury and the amendment was within the lis pendens, it was immaterial whether the action was barred by the statute of one or six years.—*Ib.* 222.

(b) Accrual of Right.

Limitation of Action; Accrual of Right of Action; Overflowing Lands.—In an action for injuries to land from overflow caused by the neglect of the railroad company to keep open culverts lawfully erected, limitations begin to run from the time of the injury and not from the time of the construction of the railway.—*Sloss-S. S. & I. Co. v. Dorman*, 321.

(c) Change of Time.

Limitation of Action; Change of Limitation; Existing Actions.—Where a judgment is rendered before the adoption of the Code of 1907, the right to take an appeal from which is expressly put at one year by section 436, Code 1896, such appeal from such a judgment is not affected by section 2868, Code 1907, since it is saved from its operation by section 10 of said later Code.—*Poull & Co. v. Foy-Hays Const. Co.*, 453.

LOGS AND LOGGING.

Logs and Logging; Contracts for Cutting; Construction.—Where the contract gave the right to cut all merchantable trees upon certain land, timber to cut 12 inches at the stump, it was the intent of the parties that the trees so cut should be suitable for conversion into merchantable timber, and that the trees should measure 12 inches in diameter at the stump, or at the point where cut, and hence, the cutting of trees 4 inches in diameter at the point where cut was not within the contemplation of the contract, although such trees might measure 12 inches in circumference.—*Gulf Y. P. Co. v. Monk*, 318.

LOST INSTRUMENTS.

See Evidence, § 7.

MALICIOUS PROSECUTION AND FALSE IMPRISONMENT.

Malicious Prosecution; Complaint; Sufficiency.—A count in malicious prosecution should aver the issuance of process; so a count averring only that the defendant maliciously and without probable cause therefor made an affidavit against the plaintiff charging him with refusing or failing to work the public road, and as a proximate consequence thereof plaintiff was arrested, and required to give bond, and that the charge had been judicially investigated and plaintiff discharged is insufficient. And the count is insufficient as a count in trespass for false imprisonment, because it fails to aver that the defendant arrested and imprisoned plaintiff or caused it to be done.—*Reach v. Quinn*, 340.

Malicious Prosecution; Wrongful Prosecution.—Where defendant did not have a landlord's lien against plaintiff for advances made, a prosecution against plaintiff by the defendant for an alleged wrongful sale of the crop to the prejudice of defendant's lien, was wrongful.—*McDaniel v. Cain*, 344.

Same; Malice; Question of Fact.—Where defendant advanced certain moneys to plaintiff and believed that he had a lien on the crop therefor, and instituted a prosecution against the plaintiff for the alleged wrongful sale of the crop to the prejudice of his lien, whether or not he was actuated by malice in so doing, was a question of fact to be determined by the court sitting without a jury.—*Ib.* 344.

Malicious Prosecution; Evidence.—Where the warrant upon which plaintiff was arrested was sworn out by the superintendent of the defendant, the duty is upon the plaintiff to show to the reasonable satisfaction of the jury that the affidavit upon which the warrant is issued was made by defendant's authority, and hence, it was error to charge that that fact must be shown to the satisfaction of the jury.—*Emerson Mfg. Co. v. Lowe*, 350.

Same; Liability of Corporation; Authority of Agency to Institute.—Independent of his inherent powers and duties, a superintendent must have had authority to swear out a warrant in order to render his corporation liable for his acts in doing so.—*Ib.* 350.

Same; Misleading Instructions.—Where the warrant for plaintiff's arrest was sworn out by a superintendent of the defendant, a charge instructing a finding for defendant if the affidavit upon which the warrant is based, was made without defendant's authority, is misleading, since independent of the authority resulting from the superintendent's duties, the authority to swear out the warrant was essential to render the defendant liable; yet, such charge will not cause a reversal as the duty was upon the other party to ask charges explanatory thereof.—*Ib.* 350.

Same; Malice; Evidence.—Malice cannot be implied in the institution of a prosecution when it was done in the exercise of a legal right.—*Ib.* 350.

False Imprisonment; Pleas.—Pleas, to a false imprisonment count in the complaint, which set out the affidavit and the warrant, are not demurrable as for a failure to show that plaintiff was arrested for what was legally a criminal offense on a valid warrant, or because the affidavit attempted to charge an offense in the alternative.—*McDaniel v. Cain*, 344.

False Imprisonment; Grounds.—Where a person is arrested under a warrant valid on its face based upon a complaint, sufficiently designating the offense, and issued by a justice of the peace, having jurisdiction of the offense tried, such person cannot maintain an action for false imprisonment.—*Emerson Mfg. Co. v. Lowe*, 350.

MASTER AND SERVANT.

1. Injury to Servant.

(a) Complaint.

Master and Servant; Injuries to Servant; Complaint.—Where the injury is alleged to have resulted from a fall into an unguarded hole in a basement, a complaint which fails to aver any duty on the employer to warn the employe of the danger which resulted in the injury is insufficient.—*Horan v. Gray-D. Hdw. Co.*, 159.

Same; Construction.—Pleading being construed most strongly against the pleader, it will be presumed that knowledge on the part of the employe of the danger existed where the complaint fails to allege any duty of the employer to warn against the danger or a want of knowledge by the employe of the danger.—*Id.* 159.

Same; Complaint.—A complaint which alleges that it was the duty of the employer to employ as fellow servants men reasonably skilled in the duties which they were to perform, and that the employer violated this duty to plaintiff and negligently employed and placed in the same room with him a third person who was not reasonably skilled in the duties he was to perform or who was incompetent, careless, etc., states a good cause of action against the demurrer interposed; and the further allegation thereof that as a proximate consequence plaintiff received the injuries complained of, sufficiently shows the connection between the incompetency of the third person and the injury to bring it within the rule that mere general averment was sufficient, without stating the *quo modo* or the acts constituting the negligence.—*Penn. C. Co. v. Bowen*, 165.

Master and Servant; Pleading; Injury to Servant; Complaint.—A complaint which alleges that the defendant was operating a coal mine and that on a certain day, while plaintiff was in pursuance of said employment in the service and employment of defendant and engaged in and about said business of defendant, while riding on a tram car of said defendant, which was being lowered in said mines by means of a wire rope or cable, said wire rope or cable broke, and as a proximate consequence plaintiff was injured, is good against demurrer that it fails to show that the injuries were received while plaintiff was performing duties in accordance with his service or employment, or that he was injured while in performance of duties which he was employed to do.—*Sloss-S. S. & I. Co. v. Chamblee*, 185.

(b) Incompetent Fellow Servant.

Master and Servant; Injury to Servant; Incompetent Fellow Servant.—Before recovery can be had against the master for the employment of incompetent servants it must appear that the master knew of the incompetence of the servant, or by the exercise of reasonable diligence could have ascertained that fact, and a complaint seeking recovery on that account must allege that the master knew of the incompetency, or by the exercise of reasonable diligence could have known it, although it is not necessary that these exact words should be used.—*Penn. C. Co. v. Bowen*, 165.

Same; Incompetent Fellow Servant.—The question being whether a servant was competent, it was not permissible to show whether, as shown by his work, he was a careful or careless miner.—*Id.* 165.

(c) Evidence.

Same; Evidence.—Where the action was for injuries to a miner employed in a coal mine by a rock falling on him and the evidence showed that the plaintiff had the direction of the work, and it was not shown that he or anyone else suggested the necessity of propping the place before the injuries, or that the duty rested upon a fellow employe, the evidence failed to show a causal connection between the incompetency of the fellow servant and the injury.—*Penn. C. Co. v. Bowen*, 165.

MASTER AND SERVANT—*Continued.*

Same; Negligence; Evidence.—A count seeking to recover damages for injuries to an employe in a coal mine caused by the falling of a rock and based on the employer's failure to furnish a safe place to work is not sustained by evidence of the failure of the employer to furnish the employe with timbers, where the employe had taken a contract to drive a heading at so much per yard, and no obligation is shown on the part of the employer to prop the place where the injury occurred.—*Ib.* 165.

Same; Safe Place to Work; Evidence.—The evidence in this case stated and examined and held not to show that the employer failed to furnish the employe a safe place in which to work.—*Ib.* 165.

Same; Evidence.—Where it was shown that a superintendent had superintendence relative to work on the outside of the mines only, it was not competent, in an action for injury resulting to an employe from falling rock in the mine, to show that such superintendent was not familiar with the work inside the mine.—*Ib.* 165.

Same.—Evidence of work done in the mine by the fellow servant and a third person after the injury, was inadmissible, in the absence of a showing that the failure to prop the place before the accident had any causal connection with or was due to the fellow servant's incompetence, the action being for injuries resulting from the incompetency of the fellow servant.—*Ib.* 165.

2. Duty to Warn.

Same; Danger to Employe; Duty to Warn.—An employer is not bound to warn his employe against a known danger or one which could be known by the use of ordinary care.—*Horan v. Gray-D. Hdw. Co.*, 159.

3. Negligence.

Same; Negligence; Burden of Proof.—The burden is on the servant to establish the master's negligence, in an action by the servant against the master for injuries to him.—*Chamberlain v. So. Ry. Co.*, 171.

Same; Negligence; Res Ipsa Loquitur.—The evidence in this case stated and examined and held sufficient to establish a prima facie case of negligence on the part of the railroad under the doctrine of *res ipsa loquitur*.—*Ib.* 171.

Same; Negligence of President or Directors.—Where the action is against a railroad for damages for death of an employe, and the action is in case and not in trespass, it is not essential to plaintiff's right of recovery to show that the president or board of directors of the railroad actually participated in the damning act.—*Ib.* 171.

(Dowdell, C. J., Simpson and Sayre, JJ., dissent.)

Master and Servant; Injury to Servant; Negligence of Superintendent.—To support an action under subdivision 2, section 3910, Code 1907, the evidence must show that the employe whose negligence is alleged had superintendence entrusted to him, and that the injury was caused by his negligence while in the exercise of such superintendence.—*Gloss-S. S. & I. Co. v. Green*, 178.

Same; Evidence.—The evidence in this case examined and stated and held to show that the person charged with negligence was entrusted with superintendence over the mines and miners within the purview of subdivision 2, section 3910, Code 1907.—*Ib.* 178.

Same.—It is negligence in one entrusted with superintendence over the mines and miners as to the safety thereof, to create or allow a condition therein to exist that will render an accident probable through the means of an intervening agency which might have been foreseen with due care.—*Ib.* 178.

MASTER AND SERVANT—*Continued.*

Same.—The evidence in this case stated and examined and held to support a finding that the foreman charged with the condition of the mines was so negligent as to authorize a recovery under subdivision 2, section 3910, Code 1907.—*Ib.* 178.

4. Common Law Duty of Master.

Master and Servant; Injuries to Servant; Common Law Duty of Master.—At common law, the master was charged with the non delegable duties to furnish proper machinery and materials for the work, to employ competent servants only, and to make proper rule and establish proper methods of work.—*Chamberlain v. So. Ry. Co.*, 171.

5. Safe Place to Work.

Same; Statutes; Construction.—Section 1021, Code 1907, does not require the miners to prop or look after the safety of entries to the miner, but rests that duty on the operator of the mines.—*Sloss-S. S. & I. Co. v. Green*, 178.

Same; Injury to Servant; Safe Place to Work.—The entry of a mine is a place which the operator furnishes and in respect to which he must exercise reasonable care to keep safe, and the employe may rely on the operator performing his duties in reference thereto.—*Ib.* 178.

6. Rules.

Same; Rules; Operation and Effect.—Where the master does not furnish cars with such appliances or other means to enable a compliance with its rules by its employes, the rule furnishes no protection to the master.—*Huggins v. So. Ry. Co.*, 189.

7. Instructions.

Same; Action; Directing Verdict.—Where there is evidence from which a jury could infer initial negligence on the part of the servant and evidence from which the jury could infer subsequent proximate negligence on the part of the master after the servant got in a dangerous position, the affirmative charge should not be given.—*Huggins v. So. Ry. Co.*, 189.

MORTGAGES.

Chattel Mortgages; Sales.—The evidence in this case examined and held not to show title in the animal under a claim of title by a purchaser at mortgage foreclosure sale.—*Blair v. Williams*, 655.

Same; Title of Purchaser.—The purchaser of property at a foreclosure sale of a chattel mortgage must show a valid mortgage from one having title.—*Ib.* 655.

MUNICIPAL CORPORATIONS.

1. Defects in Streets.

Municipal Corporations; Defect in Street; Duty of City.—Where a city permits an unguarded pit to remain in a street, it violates its duty to keep its streets in a safe condition.—*City of Mtg. v. Bradley*, 230.

Instructions.—The issue being whether the defendant city failed to put up safe guards or barriers around the pit in a street, a charge which submits to the jury the question as to whether such city took reasonable precautions to prevent injury, was inapplicable to the issues as well as submitting to the jury a legal question, and its refusal was proper.—*Ib.* 230.

Same.—A charge asserting that a defendant city is not liable for leaving a hole in a street unguarded, if the circumstances surrounding it were such as to put a person exercising reasonable care

MUNICIPAL CORPORATIONS—*Continued.*

upon notice of its existence, does not hypothesize any knowledge of such surrounding circumstances on the part of the plaintiff whose property was injured, and is, therefore, properly refused.—*Ib.* 230.

Same; Defective Street; Injury; Proximate Cause.—Where a city negligently fails to repair its streets, if the person injured is not negligent, and if the injury would not have occurred, but for the defect, it is liable for such injury caused by such defect, even though the injury would probably not have happened, but for an intervening or concurring cause for which neither party is responsible, such as a horse becoming frightened or unmanageable.—*McLemore v. City of West End*, 235.

2. Duty to Repair Streets.

Municipal Corporations; Streets; Duty to Repair.—A city is under the duty to keep its streets in reasonably safe repair to their full width.—*McLemore v. City of West End*, 235.

3. Presentation of Claims.

Municipal Corporation; Presentation of Claim; Torts.—A claim against the city of Montgomery for injuries suffered on August 1907, was properly presented under the city charter, since the municipal Code act of that year had not become operative, and if operative provided against any alteration of rights or remedies accruing or existing under previous enactment.—*City of Mtg. v. Shirley*, 239.

NEGLIGENCE.

See Master and Servant, § 3.

1. Contributory Negligence.

Master and Servant; Injury to Servant; Contributory Negligence.—As an answer to a suit against the master for injuries done the employe a plea setting up contributory negligence is demurrable if it fails to set forth the facts constituting the negligence.—*Huggins v. So. Ry. Co.*, 189.

Same; Contributory Negligence.—Where the injury was occasioned by the mere failure of the motorman to keep a proper lookout for travelers on the track, the contributory negligence of the traveler will defeat a recovery.—*Anniston E. & G. Co. v. Rosen*, 195.

Same.—Where the motorman of a car, after discovery of the traveler's peril, failed to exercise proper care, the initial negligence of the traveler became only a condition raising the duty to avert the injury, and his breach of duty became the proximate cause of the injury, authorizing a recovery, unless the traveler was guilty of contributory negligence, concurrently with or subsequently to the negligence of the motorman.—*Ib.* 195.

Same; Defenses; Contributory Negligence.—A plea alleging that defendant negligently drove on the track ahead of the car, that the street was wide enough for plaintiff to have driven on either side of the track without injury, that the car was in plain view, and that plaintiff could have stopped until the car passed, etc., is a sufficient plea of contributory negligence available as a defense to a complaint charging simple, anterior negligence, but does not state a defense to a complaint based on the failure of the motorman to exercise proper care after discovery of peril.—*Ib.* 195.

Same; Contributory Negligence.—Contributory negligence of the person injured is no defense where the proximate cause of the injury to one known to have been in peril is due to a wilful or wanton wrong.—*Ib.* 195.

Same.—Where the proximate cause of an injury to one known to be in peril is an act of simple negligence, contributory negligence of the person injured concurrent with or subsequent to that of the

NEGLIGENCE—*Continued.*

person charged with negligence after discovery of the peril, defeats recovery.—*Ib.* 195.

Damages; Injuries; Complaint.—Where the complaint definitely enumerates the elements of damage alleged to have been suffered by the plaintiff and his property, it is sufficient without designating the amount claimed for each element of damage.—*Ib.* 195.

Same; Contributory Negligence; Duty to Observe Defect.—One using a street is not required to be on the lookout for obstructions or defects in the streets, but has the right to assume that the street is in proper condition.—*City of Mtg. v. Bradley*, 230.

Same.—One travelling on horseback along the street and leading mules, is under no duty to look ahead all the while to avoid defects in the street.—*Ib.* 230.

2. Discovered Peril.

Negligence; Discovered Peril.—Whether the person injured is a trespasser or not, the principle of negligent breach of duty after discovery of peril is the same, and in each case, knowledge of the peril requires the use of all known means to avert injury.—*Anniston E. & G. Co. v. Rosen*, 195.

3. Wantonness and Wilfulness.

Same; Wilfulness and Wantonness.—When applied in cases of injury to a person by a breach of duty where the peril of the person injured is known, wilfulness or wantonness implies a direct intent to inflict injuries, or an act done or omitted with the consciousness that it would probably result in injury.—*Anniston E. & G. Co. v. Rosen*, 195.

4. Condition and Use of Premises.

Negligence; Condition and Use of Premises; Care Required in General.—Where the complaint is by the occupant of the lower floor of a building against the occupant or a person in control of the upper floor for damages by the bursting of a water pipe on the second floor, based on the duty of one to so use his property as not to injure another, it need not aver the relationship between the parties, whether that of tenant or landlord, or that of distinct ownership.—*Charlie's Transfer Co. v. Malone*, 325.

Same; Complaint.—A complaint alleging that plaintiff was lawfully in possession of stores on the grade floor of a certain building and had a large quantity of goods stored therein; that defendant was the owner and had charge of certain lavatories and the pipes used to convey water to the same; that said pipes were defective, unfit to convey water with safety, and that they burst and water flowed through on plaintiff's goods; that defendant had notice of the defective condition of the pipes several days prior to their bursting, and that their bursting would be liable to injure plaintiff's goods; that defendant was the owner, had the care and control of said hallway along which the pipes ran, and of the lavatory and pipe, but negligently failed to keep said pipes in repair, and that as a result, etc., plaintiff was damaged, states a cause of action of duty of one to so use his property as not to injure others, and is not demurrable.—*Ib.* 325.

(Tyson, C. J., Denson and Anderson, JJ., dissent.)

NEW TRIAL.

New Trial; Grounds; Misleading Instructions.—The trial court may set aside such verdict on account of misleading charges given if convinced that prejudice has resulted therefrom.—*Coleman v. Pepper*, 310.

ORGANIZATION OF COURT.

See Appeal and Error, § 1-a; see Courts.

OPTIONS.

Contracts; Option; Mutuality.—An option is unilateral until it has been exercised by the party claiming it, and hence, it is no objection to an option contract that it is wanting in mutuality.—*Stay v. Tennille*, 514.

Vendor and Purchaser; Options; Certainty; Assignability.—The option provided for the conveyance of land on the west bank of the river between normal low water line and the crest of a dam or dams of such height and at such locations on the river as the purchaser might desire to erect, as such line would meander along the west bank of the river and the north and south lines of such place; it provided further that the area of the tract referred to should be ascertained before the erection of a dam or dams was begun. The purchaser designated the height of his dam, and pursuant to the provisions of the option, a survey was made and the exact description and area of the tract agreed to be conveyed was ascertained. Held, that the subject matter of the contract was rendered certain to every intent so as to make it assignable.—*Wilkins v. Hardaway*, 565.

PARTIES.

See Equity; see Actions.

Parties; Real Party in Interest.—Under section 2489, Code 1907, an action for the breach of contract to erect a building on the premises sold need not be brought in the name of the real owner of the contract, but may be brought in the name of the original owner though the contract has been assigned.—*Bohanan v. Thomas*, 410.

Parties; Objections as to Parties; By Whom Made.—The right of the minor heirs to be made parties complainant instead of respondent in an action to set aside their testator's will, is personal to them and the objection that they should have been made complainants cannot be raised by a co-defendant.—*Hays v. Bowdoin*, 600.

PARTNERSHIP.

1. Proof under Pleadings.

Partnership; General Issue; Admissions.—Where the action was against an entity described as a partnership and the defendant appeared by counsel and interposed the plea of the general issue, it amounted to an admission of the partnership character and relieved plaintiff of the necessity of proving it.—*Shuttleworth & Co. v. Marx & Co.*, 418.

PLEADING.

1. Demurrer.

(a) Scope.

Pleading; Demurrer; Scope.—Objection to damage claimed as remote and speculative, must be taken by motion to strike or by special charges requested, notwithstanding the complaint may be tested by demurrer if not sufficient to apprise defendant of the character of the injury flowing from the wrong charged.—*O. of Ga. Ry. Co. v. Ashley*, 145.

Pleading; Objections to Complaint; Mode.—Demurrer only lies to raise the question as to whether or not elements of damages claimed, are sufficiently and definitely enough laid; not as to whether they are recoverable; so objection thereto should be taken by motion to strike, objections to evidence or requested instructions.—*Johnson v. Turner*, 356.

PLEADING—*Continued.*

(b) Grounds.

Same; Demurrers; Grounds.—Demurrers to special pleas are properly overruled where they fall to point out the infirmities in pleadings.—*Huggins v. So. Ry. Co.*, 189.

2. Matters Cognizable under General Issue.

Pleading; Special Plea; General Issue.—Special pleas setting up matters which are cognizable under the plea of general issue, are demurrable where the general issue is interposed.—*Huggins v. So. Ry. Co.*, 189.

2 1-2. Abatement.

Pleading; Pleas in Abatement; Disallowance; Discretion.—Where a term of court had been allowed to lapse after the disability arose and before the plea was offered, and the plea did not go to the merits of the case, but only to the disability of one of the parties, it was within the discretion of the court to refuse to allow it to be filed.—*Gambill v. Cooper*, 637.

Pleading; Time of Filing; Abatement.—After trial and appeal from judgment in the justice court, a plea to the jurisdiction of that court came too late.—*Blair v. Williams*, 655.

3. Amendment.

(See Limitation of Actions.)

Pleading; Amendment; New Cause of Action.—Where the complaint alleged that the defendant city negligently allowed a wire fence to be maintained in a street, and that plaintiff was injured while riding along the street by his horse becoming unmanageable and running into the fence, it is not substituting an entirely new cause of action to allow the substitution of the word, frightened, for the word, unmanageable.—*McLemore v. City of West End*, 235.

4. Conclusions.

Pleading; Conclusions.—An averment, in an action by a tenant against a landlord for damages from the bursting of a water pipe, that it was the duty of defendant to keep the pipes in a sufficiently safe condition so as to safely convey water, except by way of conclusion averred no duty on the landlord.—*Charlie's Transfer Co. v. Malone*, 325.

Pleading; Conclusions; Denial of Indebtedness.—A plea which merely states as a conclusion that the defendant did not owe the demand sued on without more fails to inform the plaintiff of what he is to meet and is not a good plea to an action on a note.—*Scott & Sons v. Rawls & Rawls*, 399.

5. Construction of.

Same; Construed Against Pleader.—The words, charge and control, as used in the counts of the complaint are susceptible of being construed as referring to the time when the lease was made, and will be so construed as against the pleader.—*Charlie's Transfer Co. v. Malone*, 325.

Same; Construction.—A pleading is always construed most strongly against the pleader.—*Scott & Sons v. Rawls, et al.*, 399.

6. Reference to other Pleading.

Same; Complaint; Reference to Other Counts.—Where a count in a complaint is rendered unintelligible by reference to another count, which was perhaps inadvertently put in, the court cannot change the writing but must read it as found.—*Charlie's Transfer Co. v. Malone*, 325.

PLEADING—*Continued.*

7. In short.

Same; Pleading; In Short by Consent.—Pleading in short by consent in the justice court should contain at least a suggestion or skeleton of the nature of the defense, else on appeal to another court that court would not be informed of the defenses.—*Blair v. Williams*, 655.

PRINCIPAL AND AGENT.

1. Admissions by Agent.

Same; Admission by Agent; Time of Making.—A declaration made by an agent while conducting a transaction within the scope of the agency is admissible for the purpose of throwing light upon the transaction itself.—*Cohn & Goldberg L. Co. v. Robbins*, 289.

2. Proof of Agency.

Principal and Agent; Proof of Agency; Declaration of Agent.—The fact of agency cannot be proven by the declarations of the agent.—*Cohn & Goldberg L. Co. v. Robbins*, 289.

Principal and Agent; Proof of Agency; Declarations.—Agency cannot be proven solely by the declarations of the agent.—*Crone & Co. v. Long & Son*, 487.

Same; Evidence of Agency.—Where it appears that the person giving the authority to one to buy for another had no authority to buy for the other or to authorize anyone else to do so, testimony that he had given the person authority to buy goods for the other was not admissible to show the agency of such a person.—*Ib.* 487.

3. Authority of Agent.

Same; Authority of Agent.—In order to hold principals liable for a purchase made by another as their agent it must appear that such other was their agent to make the particular purchase, and it was not sufficient to show that the other was their agent for any other purpose.—*Crone & Co. v. Long & Son*, 487.

Principal and Agent; Authority of Agent.—Where the evidence tended to show that the seller of materials to a contractor sought to remove the same from the owner's premises, but the owner claimed the property and refused to permit the removal unless they were to be returned, and subsequently in a telephone conversation between the owner and the foreman of the seller, the foreman promised to repair the material, return them and put them on the building, the jury were authorized to find that the foreman had the authority to act for the seller, especially where the seller subsequently acknowledged the foreman's authority.—*Richards v. Shepherd*, 663.

PUBLIC LANDS.

Public Lands; Grant of; Passing of Title.—Where the Act granting the land provides that the title to the same shall pass on selection, the legal as well as the equitable title passes out of the government, without the issuance of a patent, upon the selection being made.—*Price v. Dennis*, 625.

Same; Bounty Land Warrants; Selection Under; Equity of Locator.—Where a military bounty land warrant has been issued and the land located thereunder pursuant to the Act of Congress, and the approval of the land office, the locator obtains such an equity in the land as the state and Federal Court will protect, and gives to the locator an absolute right to the legal title and a patent, and renders void a patent issued to another in violation of the locator's equity.—*Ib.* 625.

PUBLIC LANDS—Continued.

Same; Liability to Taxation.—Until the full equitable title has passed out of the government public lands are not subject to taxation by state authority.—*Id.* 625.

Same; Grants; Government Control.—The government can convey by patent or Congress may, by act, grant the legal title of public lands to a stranger, unless the equity of a locator of public lands has become complete.—*Id.* 625.

Same; Transfer of Title From Government.—The doctrine that the legal title to land relates back to the inception of the grantee's equity is a pure legal fiction adopted solely to protect and preserve the legal title subsequently to be acquired and not to defeat it.—*Id.* 625.

Same; Bounty Warrants; Assignment; Insufficiency; Effect on Equity of Holder.—Where the records of the land office show that the selection of land under a military bounty warrant was suspended by the commissioner of the general land office because of the insufficiency of the assignment of the warrant, the equity of the assignee as the locator of the land was not perfected until the assignment was made good.—*Id.* 625.

QUIETING TITLE.

Quieting Title; Equity Jurisdiction.—By the statute a bill to quiet title is a proper subject of cognizance in equity.—*Berger v. Butler*, 539.

Quieting Title; Bill; Parties.—All parties interested in the subject matter of a bill to construe a deed of trust and to quiet title are proper parties; and it is immaterial whether they are complainants or respondents, so long as the court acquires jurisdiction of them.—*Id.* 539.

RAILROADS.

See Carriers; Master and Servant; Negligence.

1. Duty to Load Cars.

Same; Railroad; Loading Cars.—A railroad company is bound to a reasonable care in the proper loading of its cars so as not to cause injury to its servants.—*Chamberlain v. So. Ry. Co.*, 171.

(2) Excavations by.

Railroads; Excavations; Liability of Purchaser.—A railroad is not liable for excavating and other acts done in locating its track, etc., on plaintiff's land, where such acts were done by its predecessor, in an action for trespass to realty.—*Buck v. L. & N. R. R. Co.*, 305.

REBATES.

See Insurance.

Rebate; Insurance; Contracts.—Rebate is deductions from stipulated premiums allowed in pursuance of antecedent contracts; hence, a life insurance company issuing contracts providing for a special income in consideration of the rendering on request by insured of certain services to the company does not violate the provisions of section 4579, Code 1907; the services which insured obligates himself to perform afford a consideration for the obligation assumed to allow a special income, although it is optional with the company to demand the service.—*Julian, Com. v. Guarantee L. Ins. Co.*, 533.

REASONABLE DOUBT.

See Charge of Court, § 3.

RECEIVERS.

Receivers; Appointment; Grounds.—A bill seeking to have a receiver appointed to take charge of the property of a legally dissolved corporation which alleges only that a sale or lease of the corporation property was contemplated, and that it was not the best sale or lease that could be made, but does not allege the insolvency of the corporation, the incompetency of the trustee or that any fraud was attempted to be perpetrated upon the corporation, the stockholders or anyone else, states no ground for the appointment of a receiver.—*Sullivan T. Co. v. Block*, 570.

Receivers; Nature of Office.—A receiver is not the representative of a corporation or other person whose property he holds; his possession is that of the court, and he is the arm of the court to hold possession of the property and manage it for the benefit of those ultimately entitled to it.—*Ib.* 570.

Same; Payment of Money; Authority.—A receiver being an officer of the court cannot ordinarily pay out any money in his hands as such receiver without an order of the court, general or special.—*Ib.* 570.

Same; Compensation; Method of Payment.—A receiver's compensation may be allowed in periodical payments, in gross sum, or in the form of commissions on receipts and disbursements, in the discretion of the court; but if commissions are allowed, they are generally regulated with reference to the amount allowed by statute to personal representatives, etc.—*Ib.* 570.

Same.—Where a receiver is appointed in a legal manner and in good faith discharges his duties, he should not be denied compensation because the court had no power to appoint him; but should be paid out of the estate for his reasonable services, although the appointing order is subsequently reversed and the bill under which it is made, dismissed.—*Ib.* 570.

Sams; Bonds; Action for Damages.—Persons damaged by the appointment of a receiver have a right of action on the bond required to be given by the complainant before the appointment of a receiver, regardless of who must pay the costs in the suit where the appointment is vacated.—*Ib.* 570.

Same; Recovery of Damages for Wrongful Appointment.—The amount of damages suffered by the appointment of a receiver cannot be adjudicated in the decree vacating the appointment, nor in any suit in the chancery court.—*Ib.* 570.

Same; Unauthorized Payment of Debt; Liability.—Where neither the justice nor the amount of the debt is disputed, the confirmation by the chancellor of unauthorized payments by a receiver of the debts of the company worked no injury to the parties contesting the receivership, although the chancellor had no right to order a confirmation.—*Ib.* 570.

Same; Expensitures; Employment of Counsel.—Where a receiver employs counsel, the courts will determine the amount to be allowed for such services to the receiver, but where the employment was unauthorized, and the court may not allow a receiver credit for a payment made to counsel for such services, the court may ratify the receiver's act in passing upon his account, although not allowed in the first instance.—*Ib.* 570.

Receivers; Expenses of Administration; Premium on Bond.—If compensation be allowed the receiver at all, the receiver is properly credited with the premium on the bond, since it is a proper charge for the expense of administration of receivership.—*Ib.* 570.

Same; Outlay by Agreement of Parties.—Where, by agreement of the parties to the suit a stenographer was hired, to be paid out of the trust funds in the hands of a receiver, but subject to whatever

RECEIVERS—*Continued.*

taxation of cost should be decreed in the case, such agreement left the matter to the decree of the court and the expense could not be said to be improperly allowed because it could not be taxed as costs.—*Ib.* 570.

Appeal and Error; Compensation of Receiver; Discretion.—The amount to be allowed a receiver as well as the question of whether anything should be allowed, rests within the sound discretion of the court, in the absence of a statute regulating such compensation, and the court's action will not be reviewed on appeal unless the discretion is manifestly abused.—*Ib.* 570.

Same.—The taxation of the costs of compensation for a receiver improperly appointed as well as the costs of the suit necessary upon the administration of the estate while the receivership was pending rests within the sound jurisdiction of the court, subject to review only in case of abuse, or where the chancellor clearly acts arbitrarily, and not in the proper exercise of the authority vested in him by the statute, and decisions of the state.—*Ib.* 570.

RECOUPMENT.

Pleading; Recoupment; Nature of Remedy.—A plea of recoupment is a proper procedure to bring the matter before the court and have the damages considered where a defendant has been damaged by a breach by plaintiff of the contract sued on.—*Poull & Co. v. Foy-Hays Const. Co.*, 453.

ROBBERY.

Robbery; Evidence.—The prosecutor may testify that he did not consent to the taking of his money, in a prosecution for robbery.—*Davis v. The State*, 104.

COURT RULES:

30. Circuit Court Pr. C. of Ga. Ry. Co. v. Ashley, 415.

SAFE PLACE TO WORK.

See Master and Servant, § 5.

SALES.

See Contracts; Vendor and Purchaser.

1. Conditional Sales.

Sales; Conditional Sale; Removal of Stuff by Vendee.—The contract in this case examined and held to constitute a conditional sale entitling the vendors to protection afforded by section 7342, Code 1907.—*Steele v. The State*, 9.

Same; Offense; Claim.—The use of the word, claim, under section 7342, Code 1907, is in its popular sense signifying a right to claim; a just title to something in the possession of or at the disposal of another.—*Ib.* 9.

2. Warranty in and Breach.

Same; Implied Warranty; Sale by Description; Caviat Emptor.—Where goods are sold by description and not by the buyers selection, and without any opportunity of inspection before buying there is ordinarily an implied warranty that they conform to the description in terms, but also that they are not so inferior as to be unsalable among dealers in such goods; and the doctrine of caviat emptor does not apply to such a sale, especially where the seller is the manufacturer or the sale is executory for future delivery.—*Baer & Co. v. Mobile C. & B. Mfg. Co.*, 491.

SALES—Continued.

Same; Breach of Warranty; Remedy of Buyer.—The buyer may rescind by refusing the goods, may accept the goods and sue for the breach, or may recoup by counter claim for damages for the breach if the seller elects to sue for the price, where there has been a breach of warranty in the sale.—*Ib.* 491.

Same; Waiver; Fraud.—Since the warranty survives the acceptance, the mere acceptance and use of goods by a buyer, even after a knowledge of defect would not prevent the buyer's action upon a warranty or for fraud.—*Ib.* 491.

Same; Contract; Construction; Warranty.—Where a seller and manufacturer agreed to deliver as much shipping cull and mill cull lumber as the buyer should desire to a certain limit, at prices fixed for each, knowing when the contract was made the use to which the buyer desired to put the goods, such seller complied with its contract if it delivered either shipping or mill cull which were merchantable and could be used for the purpose for which they were ordered, and this without any regard to any custom as to size or quality; but the agreement contained an implied warranty that when the seller delivered shipping culls, as shipping culls, it would not substitute mill cull and collect the higher price for shipping culls.—*Ib.* 491.

SELF DEFENSE.

See Homicide, § 2.

SET-OFF AND COUNTER CLAIM.

Same; Set-off; Burden of Proof.—Where defendant set off plaintiff's alleged breach of another contract in defense of an action for breach of contract, the defendant has the burden to prove to the jury's reasonable satisfaction, the material allegation of his pleas of set-off, or one of them.—*Poull & Co. v. Fay-Hays Const. Co.*, 453.

Set-off and Counter Claim; Nature.—A set-off is a final demand growing out of an independent transaction, not sounding in damages merely subsisting between the parties at the commencement of the suit, and may be either liquidated or unliquidated.—*Ib.* 453.

SHERIFFS AND CONSTABLES.

Right to arrest, and how made, see Death.

Sheriff and Constable; Liability on Bond; Defenses.—Where the only damage claimed is the loss of the property which is held by a defendant in detinue who was cast in the suit and who after the termination of the litigation tendered the property to a deputy sheriff, who refused to receive it, whereby the property was lost to the plaintiff, in an action on the bond of the sheriff for the recovery of the value of the property, the fact that the defendant tendered the property to the plaintiff after he had tendered it to the deputy, and the plaintiff refused to receive the property, may be shown in defense of such action.—*Carroll v. Burgin*, 406.

Same; Termination of Office.—A sheriff does not breach his bond by refusing to receive property tendered by a defendant in detinue holding under a forthcoming bond, and cast in the suit, after his term of office had expired.—*Ib.* 406.

Same; Defenses.—The fact that the defendant in detinue offered to deliver the property to an attorney of record for the plaintiff and that he refused to receive it, is not a defense to an action on the sheriff's bond since by the terms of the bond the defendant was bound to deliver it to the plaintiff.—*Ib.* 406.

SPECIFIC PERFORMANCE.

Specific Performance; Contracts Enforcible; Certainty; Time of Performance.—Where the owners of stock agreed that if any one of the parties desired to sell his stock in the enterprise he should first offer the same to the other parties owning stock, and on the death of any party his heirs, executors or administrators should sell to the other parties owning stock the decedent's stock to the amount of \$5,000, or all of decedent's stock if it should be less than that amount, and this at the option of other parties owning stock, before offering the same on the market, the contract was indefinite as to the time when the right of option to purchase would arise, and unless the bill renders the tenure definite by an averment of an offer by the administratrix to sell the stock or of any intention on her part to sell the same, the contract is unenforceable specifically against the administratrix of such estate, as to the sale of the stock.—*Stay v. Tennessee*, 514.

Specific Performance; Demurrer; Grounds.—Where the bill does not show that the land for which a conveyance is sought is a part of a larger tract owned by defendant, it is not demurrable on the ground that specific performance would infringe defendant's homestead right, either in the particular tract or in the right of selection from a larger tract, since it will not be assumed from such facts alone that it was a part of defendant's homestead.—*Wilkins v. Hardaway*, 565.

Specific Performance; Contracts Enforcible; Certainty.—A contract is not rendered too uncertain to warrant its specific performance by the mere fact that the contract reposed in the purchaser the right to determine the line of the tract by determining the height of the dam to be erected.—*Id.* 565.

Same; Pleading; Demurrer.—Where the bill averred that pursuant to the contract surveys were made and the exact description and area of the tract agreed to be sold ascertained, the bill was sufficient against demurrer, and contains sufficient averment to show that all uncertainty was removed.—*Id.* 565.

STATUTES.

See Constitutional Law.

1. Amendment in Passage.

Statutes; Amendment in Passage; Changing Original Purpose.—Where the change in the statute pending its passage, was from the word, opening, to the word, holding, in regulating and fixing the time for opening or holding court, such change did not render Acts 1888-9, p. 64, violative of section 19, article 4, Constitution 1875; the terms as used, being synonymous.—*Letcher v. The State*, 56.

2. Subject and Titles.

Statutes; Subjects and Title.—Section 45, Constitution 1901, requires that a law have but one title, and the provisions of it are satisfied if the law has but one general subject, which will support all matters reasonably connected with it, fairly indicated in the title, and all proper agencies which may facilitate its accomplishments, are germane to the title; the form of the title must be left to the legislature and not to the court.—*Glasscock v. The State*, 90.

Same.—Local Acts 1900-01, p. 688, is not violative of section 45, Constitution 1901.—*Id.* 90.

3. Repeal.

Statutes; Local and Special; Repeal.—Section 10, Code 1907, applies only to repeals by implication, and therefore, is not in conflict with sections 6733, Code 1907, which section repeals all local

STATUTES—Continued.

or special laws in conflict with it, relative to the fixing and defining the jurisdiction of justices of the peace in criminal matters.—*The State v. Spurlock*, 122.

Statutes; Repeal; Failure to Incorporate in Code.—If no contrary intention is expressed in the Acts adopting the Code, the general rule is that general statutes of a public nature in force when the Code is adopted and promulgated, and not embraced therein, are repealed by such omission, and by the laws providing for the preparation, revision, adoption and promulgation of the Code; hence, section 436, Code 1896, was repealed by section 2868 Code 1907.—*Poull & Co. v. Foy-Hays Const Co.*, 453.

4. Enactment.

Statutes; Enactment; Validity.—General Acts, Special Session, 1907, page 80, is void because in its passage through the Senate it was reported from a committee other than the one to which it was referred, and was enacted in violation of section 62, Constitution 1901.—*Tyler v. The State*, 126.

STREET RAILROADS.

1. Use of Street.

Street Railroads; Use of Street.—Travelers in public streets and street cars operated therein have equal rights, and in the exercise of the common right by each, the streets must be so used as not to unreasonable hinder or endanger either.—*Anniston E. & G. Co. v. Rosch*, 195.

Same; Care Required of Operator.—While the operator of a street car in a public street may assume that apparently adult persons, or property under their control, will leave the track in time to avoid injury, such operators can not rely on such assumption beyond the point where prudence would suggest the stopping of the car on reasonable appearance of the inability of the traveler to get out of danger, since the duty is on the operator to keep a lookout for persons on track and to so operate the car that it may be stopped and injury averted to person or property on the track.—*Ib.* 195.

Same; Care Required of Travelers.—One travelling on a street on which cars are operated has the duty to lookout for them, and when the street is obstructed, should listen and in some instances stop.—*Ib.* 195.

2. Injury to Persons on Track.

Same; Injuries of Persons on Track; Evidence.—Where the breach of duty relied on was the failure to employ proper means to avert the injury after a discovery of the traveler's peril, knowledge of the peril before injury must be shown; and this is not done by mere proof of a breach of duty to look for persons in peril regardless of the place where the injury occurred, in the absence of proof of willfulness or wantonness.—*Anniston E. & G. Co. v. Rosen*, 195.

Same; Liability.—Where a traveler whose peril and inability to extricate himself therefrom could have been discovered by the motorman, had he kept a lookout, his failure to keep a lookout for travelers on the street, was the proximate cause of the injury, aside from wantonness or willful misconduct.—*Ib.* 195.

3. Complaint against.

Same; Complaint.—Actual knowledge of plaintiff's peril is necessary to a recovery against defendant for a failure to exercise reasonable care after a discovery of peril; therefore, a complaint alleging that plaintiff's position of peril was known to the motorman, or by the exercise of reasonable care could have been known to him, and that by the use of such means at hand, the motorman

STREET RAILWAYS—*Continued.*

could have stopped the car in time to have prevented the collision, is in the alternative, and does not amount to a charge of actual knowledge.—*Anniston E. & G. Co. v. Rosen*, 195.

Same.—A count charging simple negligence, a negligent failure to take means to avert injury after discovery of peril and wantonness or wilfulness, is inconsistent. Count 2 is subject to this criticism.—*Ib.* 195.

Same.—A count alleging that plaintiff was rightfully at the crossing where a great many people were accustomed to pass, and averring that it was the duty of the motorman to so operate his car that it might be under such control as to be stopped before striking one on the track, and that the car was negligently operated at a reckless speed so that the motorman was unable to bring the car to a stop before the collision, charges simple negligence, anterior to a breach of duty raised by the discovery of peril.—*Ib.* 195.

Same; Complaint; Sufficiency.—A complaint alleging negligence of the company in general terms, without averring the name of the negligent servant, is sufficient.—*Ib.* 195.

SUPERINTENDENCE.

See Master and Servant, §§ 1 and 3.

TELEGRAPHS AND TELEPHONES.

Telegraphs and Telephones; Failure to Promptly Transmit; Damages; Mental Suffering.—Where there is no evidence tending to show that if the telegram had been promptly transmitted and an answer received, it would have given any information different from that which plaintiff already had, a recovery cannot be had for mental anguish, and the court properly concluded evidence relative thereto.—*Leland v. W. U. Tel. Co.*, 245.

Same; Exemplary Damages.—Under the facts in this case the delay of the operator in sending the telegram cannot be made the basis for exemplary damages.—*Ib.* 245.

Telegraphs and Telephones; Transmission of Message; Failure to Deliver.—It is immaterial whether the relationship between the parties is revealed to the telegraph company's agent when the message is delivered, if the wording of the message shows the urgency of prompt transmission, and charges defendant with notice of the relationship and that plaintiff would be subjected to physical pain and mental suffering as a natural consequence of its failure to promptly deliver the telegram.—*Postal T. & C. Co. v. Beal*, 249.

Same; Damages.—A plaintiff is entitled to recover damages for a failure to deliver a message, for the pain resulting from the absence of his mother's care, when but for the breach of the contract she might have been with him, where the message notified defendant telegraph company that plaintiff was badly injured and carried with it notice that the sendee was plaintiff's mother and apprised defendant of the necessity of prompt delivery.—*Ib.* 249.

Telegraphs and Telephones; Operator as Agent of Sender.—If a telegraph operator writes a message on one of the company's blanks, at the request of the sender, he becomes the sender's agent in the writing of the telegram binding the sender by the terms of the contract.—*W. U. Tel. Co. v. Benson*, 254.

Same; Delayed Message; Burden of Proof.—Where the sender of a telegram imparted no information as to whether the sendee lived within or without the free delivery limit of the terminal office and paid no extra toll to secure delivery out of such limit and the sending operator had no information as to residence of the sendee, the duty is on the sender of the message, in an action for failure to

TELEGRAPHS AND TELEPHONES—*Continued.*

promptly deliver the message, to show whether the addressee lived within the free delivery limits of the terminal office.—*Id.* 254.

Same; Instructions.—Where there was an issue as to whether the company had exercised reasonable diligence within the free delivery limit to make a delivery of a telegram a charge asserting that the company's duty to make free delivery was conditioned on the addressee's residence within the free delivery limit, and that until that condition was shown the company was not in default, under the pleading and evidence, was properly refused.—*Id.* 254.

Same.—A charge asserting that unless the addressee lived within the free delivery limits of the terminal office, the sender could not recover, tended to mislead the jury to believe that if the sender fails to show the location of the addressee's residence within the free delivery limit, he could not recover although the company did not exercise reasonable diligence in an effort to make the delivery within such limit.—*Id.* 254.

Same; Damages for Mental Anguish.—Where a telegraph company negligently failed to deliver a message by one brother to another announcing the death of a third brother, the sender may recover damages for mental anguish.—*Id.* 254.

Same; Death Message; Notice of Relationship; Mental Anguish.—Where the telegram announces a death and directs the sendee to come at once, the company is charged with notice of relationship between the parties, the consequence of a possible failure to deliver according to the terms of the contract, and that mental pain and anguish will probably result, where the sendee and decedent's surname are identical.—*Id.* 254.

Same; Damages Recoverable.—Where the sender of a message, addressed to the sendee, announces the death of a brother of both, and summons the addressee to come at once, suffers mental pain from being deprived of the presence of the addressee before and during the burial of the brother as a proximate consequence of the failure of the company to promptly deliver the message, such pain is an element of damage recoverable by the sender; however, the mental anguish naturally arising from the death should not be confounded by the jury with that resulting from the company's negligence.—*Id.* 254.

Same; Mental Anguish; Evidence.—It is not necessary that there be positive or direct evidence of mental pain such as expressions or exclamations indicating such suffering, to authorize a recovery for mental anguish caused by the company's negligent delay in the delivery of the death message; the jury may infer the same from an application of their own knowledge of human nature and their experience from the attendant facts and circumstances.—*Id.* 254.

Same; Jury Question.—Even though there is evidence of mental suffering caused by negligent delay in the delivery of a death message, the question as to whether it existed is one to be left to the jury as a basis for damages.—*Id.* 254.

Same; Free Delivery Limits.—Although the usual route in going from the telegraph office to the residence of the sendee was more than half a mile, yet if the residence of the sendee was within the half mile radius from the terminal office, which half mile radius constituted the free delivery limit of that office, the sendee was entitled to free delivery.—*Id.* 254.

Same; Delayed Message; Punitive Damages.—For a breach of contract to promptly deliver a message, exemplary or punitive damages are not recoverable from a telegraph company.—*Id.* 254.

TELEGRAPH AND TELEPHONE—*Continued.*

Same; Damages; Instruction.—A charge asserting that if the defendant telegraph company's conduct in failing to deliver a message was such as to be wholly in disregard of the sender's right, the jury could consider that in assessing damages, authorized the recovery of exemplary or punitive damages, and should not have been given.—*Ib.* 254.

Same; Evidence.—Where the complaint charged that the addressee would have attended the funeral if the telegram had been promptly delivered, it was competent for the addressee to testify that he could have made connections with the train and would have gone to the funeral if he had received the message earlier.—*Ib.* 254.

Same.—In an action for failure to deliver a telegram promptly it was competent to show by the witness that witness asked the company's agent, who was looking for the sendee, whether the message was important or not; that the agent replied, he did not know whether it was; that witness told the agent he would deliver it; that the agent took the message away and that the witness told the agent where he could find the addressee.—*Ib.* 254.

TRANSFER OF CAUSES.

See Jurisdiction, § 1.

TRESPASS.

See Explosives.

1. Criminal.

Trespass; After Warning; Person Giving Warning.—Where the warning is given by one in his capacity as an officer of the law, and not as the agent of the owner, the person so warned cannot be convicted of trespass after warning, although the person giving the warning was the agent of the owner with authority to warn all trespassers.—*Templin v. The State*, 128.

2. Civil.

(a) Possession or Title to Maintain.

Trespass; Possession to Maintain.—In order to recover for trespass to land a party must have been in possession, actual or constructive, at the time of the commission of the trespass; but it is not essential to his right of action that he be in possession at the commencement of the suit.—*Buck v. L. & N. R. R. Co.*, 305.

(b) Damages.

Same; Damages.—The measure of damages for trespass to realty is the difference in value of the land before and after the trespass.—*Buck v. L. & N. R. R. Co.*, 305.

Trespass to Realty; Damages; Aggravating Circumstances.—Where the acts of trespass complained of are attended by aggravating circumstances of wantonness or malice, exemplary damages may be recovered for trespasses to realty.—*Coleman v. Pepper*, 310.

(c) Consent.

Trespass; Cutting Timber; Consent.—Where the jury was authorized to draw from plaintiff's acts and other evidence an inference that plaintiff did not consent to the cutting of the timber, the absence of positive testimony that he did not consent will not bar plaintiff from recovering in an action of trespass for cutting timber.—*Bufford v. Little*, 300.

Same; Instructions.—Charges asserting that there was no evidence that the defendant took from plaintiff's land 300 pine trees already cut, as averred, or that defendant cut or sawed 300 pine trees from plaintiff's land, were misleading, in that, under them, the jury might be led to believe that the plaintiff should not recover un-

TRESPASS—Continued.

less he proved the cutting or hauling of 300 pine trees, when in fact, plaintiff was entitled to recover as a matter of law, for any less number proven.—*Ib.* 300.

TRIAL.

1. Conduct of Court.

Trial; Conduct of Court; Reading Statute to Jury.—The court may properly read to the jury the sections of the Code bearing upon the crime for which one is then being prosecuted.—*Frazier v. The State*, 1.

2. Argument of Counsel.

Criminal Law; Trial; Argument of Counsel.—It is error to permit remark of counsel stating facts that are not in evidence before the jury to be allowed.—*Tannhill v. The State*, 51.

Trial; Argument of Counsel; Reading From Reports.—In the presentation of the law of the case to the court counsel may read the report of facts from another case in connection with the opinion in the case.—*W. U. Tel. Co. v. Benson*, 254.

3. Objection to Evidence.

Appeal and Error; Admission of Evidence; Proper in Part.—Where a question is asked which is improper in part, objection to it is properly overruled unless objection separates the good from the bad, so the defendant being competent to testify as to his consent or not to the taking of his money, a general objection to the question, whether defendant was willing or consented to the taking of his money was properly overruled.—*Davis v. The State*, 104.

Trial; Objection to Evidence; Time.—After a question has been answered an objection to the question comes too late.—*City of Mtg. v. Shirley*, 289.

Trial; Objection to Evidence; Time for.—An objection to a question not made until after the witness answers the question comes too late, notwithstanding the court declared the evidence proper at the time he overruled the objection.—*Cohn & Goldberg L. Co. v. Robbins*, 289.

Trial; Reception of Evidence; General Objection.—Unless the evidence is manifestly illegal and irrelevant, and apparently incapable of being rendered admissible in connection with other evidence, an objection thereto that it is illegal, irrelevant and incompetent, is a general objection and cannot be sustained.—*Bufford v. Little*, 300.

Same; Best and Secondary Evidence.—Secondary evidence otherwise admissible except for the fact that primary evidence was accessible, is not open to the objection that the question calling for was incompetent, illegal and immaterial.—*Ib.* 300.

TROVER AND CONVERSION.

Trover and Conversion; Complaint; Failure to Aver Time.—A complaint in trover which fails to aver the time of the alleged conversion is insufficient and open to demurrer. (Form 24, page 1199, Code 1907.)—*Tallassee Falls Mfg. Co. v. 1st Nat. Bank*, 315.

Same; Pleading; Sufficiency of Plea.—A plea as an answer to an action brought by a mortgagee which alleges that the proceeds of the goods alleged to have been converted, had been applied to a lien upon the goods superior to that of plaintiff, but which fails to allege the ownership of the lien is too indefinite and uncertain and open to demurrer as such.—*Ib.* 315.

Same; Title to Sustain.—In order to sustain an action of trover and conversion the plaintiff must have at the time of the conversion title to the property converted, general or special, and possession,

TROVER AND CONVERSION—*Continued.*

or the immediate right of possession; and where the plaintiff claims under a mortgage on a growing crop by the terms of which the property was to remain with the mortgagor until a specified future date, such plaintiff could not maintain trover where a conversion of the property occurred before that time.—*Ib.* 315.

TRUSTS.

Trusts; Construction; Equity; Jurisdiction.—The construction of a deed of trust is, both by the common law and by the statute, a proper subject of equity jurisdiction.—*Berger v. Butler*, 539.

ULTRA VIRES.

See Banks and Banking; Bills and Notes; Corporations.

VENDOR AND PURCHASER.

See Contracts, § 4.

Vendor and Purchaser; Money Paid Under Contract; Right to Recover.—Where a written proposition for the sale of lands provides that the property may be withdrawn unless the bid for the land is received by a certain date, the contract is withdrawn by its very terms where the money is not paid by the purchaser or the bid not made thereunder to the vendor or its agent until after the date specified; the contract is therefore void and not binding on the vendor, and could not be enforced against the vendor, thus rendering it not binding on the purchaser; and in the event money has been paid on it, the purchaser is entitled to recover the money.—*Mtg. Lodge No. 596 B. P. O. E. v. Massie*, 437.

Vendor and Purchaser; Contract; Concurrent Condition.—A contract whereby the purchaser agrees to purchase and the vendor agrees to sell the real estate therein described for a specific consideration, contemplates that the payment of the price and the execution of the conveyance should be contemporaneous, and creates concurrent dependent conditions on each to do that which each had engaged to do.—*Brady v. Green*, 482.

Same; Breach of Contract; Complaint.—Under a contract whereby the purchaser agrees to buy and the vendor to sell certain described property at a given price, the complaint for a breach thereof which alleges that the purchaser was ready, able and willing and offered to comply with his part of the contract, and that the vendor refused to convey the property, sufficiently avers performance by the purchaser of the acts necessary to put the vendor in default.—*Ib.* 482.

Same; Contract; Performance.—Where the vendor refuses to convey it is not incumbent on the purchaser to tender to the vendor a deed to the property prepared for conveyance, in order to maintain an action for the breach of the contract.—*Ib.* 482.

Same; Price.—A contract for the sale of real estate for a stated consideration imports the payment of cash in the absence of stipulations for credit.—*Ib.* 482.

Vendor and Purchaser; Contract; Fraud; Evidence.—One seeking to set aside a purchase of land on the ground of fraud of the vendor has the burden of establishing the fraud by clear and convincing proof.—*Coleman v. Kiernan*, 543.

Same.—Where there was a direct conflict in the evidence as to the fraudulent misrepresentation inducing the purchaser of the real estate, the fraud is not established by that clear and convincing proof essential to relief, although the number of witnesses testifying preponderated in favor of the person asserting the fraud, since his evidence was not entirely free from conflict, and there were corroborating circumstances as to each contention.—*Ib.* 543.

VERDICT.

Trial; Verdict; Certainty.—Where the verdict was for the plaintiff assessing damages at "3000.00" it was not so defective as not to support the judgment because a dollar mark or the word dollars, was not supplied.—*City of Mtg. v. Shirley*, 239.

WARRANTS OF ARREST.

Warrants of Arrest; Signature; Validity.—A warrant of arrest issued by a justice of the peace, but not signed by him officially or with the initials of his office, and the official character of the signature nowhere appearing thereon, is invalid, although it is signed by the individual who is the justice. (Sec. 5208, Code 1896.)—*Reach v. Quinn*, 340.

WILLS.

Wills; Action to Set Aside; Parties.—Heirs of a testator are proper parties to an action to contest and set aside a will, though they take nothing under the will, since if the will be set aside, they become distributees; but the mere fact that all the heirs are not joined as parties complainant in an action to set aside the will does not affect the right of some of the heirs to maintain the bill, and where no relief is prayed against minor children of testator in an action to set aside the will, it is not material to the maintenance of the bill that they are made parties defendant instead of complainants.—*Hays v. Bowdoin*, 600.

Same; Validity; Grounds of Contest.—A contestant is not confined to any single ground of contest but may allege any or all grounds mentioned in the statute which goes to the invalidity of the instrument.—*Ib.* 600.

Same; Consistency of Grounds.—The allegation that the testator was of unsound mind is not inconsistent with the allegation that the will was procured by undue influence.—*Ib.* 600.

Same; Pleading; Demurrer.—The relief to be awarded is to be determined on the final hearing and cannot properly be raised by demurrer to the bill to set aside the will.—*Ib.* 600.

WITNESSES.

1. Examination.

Witnesses; Contradiction; Corroboration.—Where a witness has been permitted without objection to testify as to wounds he has received during the difficulty, and the defendant had sought to discredit his testimony by showing, from the position of the wound, that witness was facing defendant with his pistol in his hand, pointed at the defendant, it was proper to permit the witness to show his wounds to the jury.—*Andrews v. The State*, 14.

Same; Cross Examination; Character.—While the character of a witness or defendant cannot be proven by particular acts, and good character cannot be rebutted by proof of particular acts, yet, a witness may be asked on cross examination as to whether or not he has heard of certain particular acts to test the credibility of his accuracy; and hence, witnesses who have testified to defendant's good character may be asked on the cross as to how many fights they have heard of accused having, and as to whether or not he is regarded by the citizens of the community as a dangerous citizen.—*Ib.* 14.

Same; Examination; Leading Question.—A question "Tell the jury if you saw the pistol balls near the watering tub" is objectionable as being leading, and as assuming as a fact that the pistol balls were near the tub.—*Ib.* 14.

WITNESSES—*Continued.*

2. Credibility and Impeachment.

Witnesses; Credibility.—A witnesses' credibility may not be attacked by asking him a question, "You were arrested for selling whisky in Roanoke about June 1st, yourself, were you not?"—*Smith v. The State*, 68.

Witnesses; Credibility; Conviction of Crime.—Construing together sections 4008 and 4009, Code 1907, the solicitor may ask a defendant's witness if he had not served a term in the penitentiary, and for what he was sent up, and on the witness answering for murder, he may be asked how long he staid there.—*Ib.* 68.

Witnesses; Impeachment; Bad Character; Community and Neighborhood.—Although a witness may reside in Baltimore, if he has an established business in Mobile, and spends much of his time there, evidence as to a knowledge of his character in Mobile is admissible as a predicate for impeaching testimony; the words community and neighborhood, having no exact geographical definition, but meaning in a general way, where a witness is well known and has established a reputation, so that the inquiry is not confined to the domicile.—*Baer & Co. v. Mobile C. & B. Mfg. Co.*, 491.

3. Competency.

Same; Competency of Witness.—It is the duty of one desiring to know upon what foundation a witness will base his answer as to the duty to inspect and keep up the roof of the entry of the mine to interrogate the witness upon that subject before permitting the witness to answer the question, and if such examination reveals the lack of knowledge on the part of a witness, the court should sustain an objection to the question.—*Sloss-S. S. & I. Co. v. Green*, 178.

Witnesses; Competency; Knowledge.—A witness having testified that he was working for defendant, and hauling logs under his direction, may testify that he hauled the logs from the land in question in the direction of the defendant's mill, the action being for trespass for cutting timber.—*Bufford v. Little*, 300.

WORDS AND PHRASES.

1. Intoxicating Liquors, etc.

Words and Phrases; Intoxicating Liquors; Alcoholic or Spirituous Liquors.—The phrase, alcoholic or spirituous liquors, necessarily means intoxicating liquors.—*Marks v. The State*, 71.

Same; Spirituous and Intoxicating Liquors.—Pure Alcohol is within the term, spirituous and intoxicating liquors.—*Ib.* 71.

Same; Liquors or Liquor.—The term, liquors or liquor, includes all kinds of intoxicating decoctions, whether spirituous, vinous, malt or alcoholic.—*Ib.* 71.

Same; Whisky.—Whisky is alcohol diluted with water and mixed with other elements or ingredients.—*Ib.* 71.

Same; Alcoholic.—Alcoholic means containing or pertaining to alcohol, and alcohol has but one source, viz., fermentation, and is extracted from its by-products by distillation, and while it is the intoxicating principle of all drink within the meaning of ordinary prohibition, statute, it is rarely used in its pure state, as a beverage.—*Ib.* 71.

Same; Intoxicating Bitters.—Intoxicating bitters include those bitters, beverages, or decoctions in which the distinctive character and effect of intoxicating liquors are present, so that it may be used as a beverage, notwithstanding its other ingredient; and, though the other ingredients are medical and predominate, and alcohol is used to preserve these medical properties and serve as a vehicle

WORDS AND PHRASES—*Continued.*

therefor, if it can be used as a beverage, then it may or may not be included in the prohibition statute unless the statute specially so declares by name, depending on the evidence in the particular case, since the court cannot declare, as a matter of law, that particular beverages or bitters are or are not intoxicating.—*Ib.* 71.

Same; Malt Liquors.—Porter, ale, beer, etc., are embraced in the term, malt liquors, and are the product of a process by which grain is steeped in water to the point of germination, the starch being thus converted into saccharine, which is kiln dried, then mixed with hops, and by further process of brewing made into a beverage.—*Ib.* 71.

Same; Vinous Liquor.—Vinous liquor means liquor made from the juice of grapes, and may also include wines made from fruit or berries, by process of fermentation by the addition of sugar and alcohol.—*Ib.* 71.

Same; Spirituous Liquor.—Spirituous liquor is liquor composed in whole or in part of alcohol, extracted by distillation, such as whiskey, brandy or rum, and these liquors are regarded as spirituous or intoxicating without the necessity of proof.—*Ib.* 71.

2. Timber.

Words and Phrases; Timber.—Timber as used in common parlance, is such stuff as is suitable for building and allied purposes.—*Gulf Y. P. L. Co. v. Monk*, 318.

3. Misappropriation.

Words and Phrases; "Misappropriation."—Although the word "misappropriation" is susceptible of the meaning of dishonesty, embracing embezzlement, yet when considered alone the word does not, in all cases, but necessarily mean dishonesty.—*Johnson v. Turner*, 356.

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